No. 371 LIBRARY
SUPREME C

Office - Supreme Court, U.S.
FILED
AUG 14 1957
JOHN T. FEY, Clerk

TRANSCRIPT OF RECORD

IN THE

United States Court of Appeals

FIFTH CIRCUIT

No. 16,292

UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES and HOLT P. DANIELS,
Appellants.

VERSUS

H. A. PHILLIPS, TRUSTEE, *Appellee*

U. S. COURT OF APPEALS
FILED
DEC 7 1956
JOHN A. [illegible] Co., 402 M & M Bldg., Houston 2

Appeal From the United States District Court
for the Southern District of Texas

CLERK

(ORIGINAL RECORD RECEIVED AUGUST 28, 1956)

INDEX

	PAGE NO.
Appellants' Designation as to Printing of Record	1
Appellee's Designation as to Printing of Record	2
Appellee's Amended Request for Printing of Additional Portions of the Record	3
Appellant's Designation of Contents of Record on Appeal	5
Appellee's Designation of Contents of Record on Appeal	7
Caption	8
Second Amended Complaint	9
Request for Admissions	22
Defendants' First Amended Original Answer	24
Stipulation	38
Minutes of Annual Meeting of Board of Directors held on January 26, 1953	39
Order for Separate Trial	43
Reporter's Transcript of Testimony	44
Testimony of Mr. Holt P. Daniels:	
Direct Examination	50
Direct Examination (continued)	90
Cross Examination	150
Redirect Examination	205
Recross Examination	238
Redirect Examination	243
Testimony of Mr. Phillip D. Hinton:	
Direct Examination	186
Cross Examination	202
Testimony of Miss Mary Alice Dionne:	
Direct Examination	243
Testimony of Mr. Edwin I. Davis:	
Direct Examination	255
Cross Examination	271
Redirect Examination	281
Testimony of Mr. H. A. Phillips:	
Direct Examination	284

Plaintiff's Exhibits:

		PAGE NO.
5	Ledger Sheet, Account 206	72
6	Promissory Note, 9/14/53, marked Px 13, Deposition of H. M. Seydler	83
7	Assignment of Account Receivable, marked Px 13 to Deposition of H. M. Seydler	83
8	Document	87
9	Daily Log, Chili Simpson	91
10	Promissory Note, 11/5/53	93
11	Assignment of Account Receivable	93
12	Invoice	93
13	Bank Form	93
14	Promissory Note, 11/9/53	98
15	Assignment of Account Receivable	98
16	Invoice	98
17	Bank Form	98
18	Promissory Note, 8/31/53	101
19	Assignment of Account Receivable	101
20	Log Sheet, Chili Simpson	103
21	Log Sheet, Chili Simpson	104
22	Income Tax Return, 1952	106
23	Income Tax Return, 1953	106
24	General Ledger Sheets, 1951 & 1952	110
25	Check #119527	111
26	Journal Voucher, 3/30/53	117
27	Journal Voucher, 3/3/53	117
28	Journal Voucher, 4/30/53	118
29	Journal Voucher, 5/6/53	118
30	Journal Voucher, 5/13/53	120
31	thru 59 Journal Vouchers, various dates	120
59	Cancelled Exhibit Number	136
60	Number reassigned to Statement of Financial Condition	136
61, 62	Dun & Bradstreet Reports	187
63	Bank Records	187, 247
64	Bank Records	248
65	Sight Draft	254
66	Notice	254

Defendants' Exhibits:

	PAGE NO.
1 thru 10 Ten documents; checks and deposit slips	165
11 Certificate #4, Green's Bayou	172
12 Certificate #5, Green's Bayou	173
13 Stub of Certificate #5	173
14 Unrecorded Equity Sheet	175
15 Unrecorded Equity Sheet	175
16 Appraisal	183
Findings of Fact and Conclusions of Law	290
Final Judgment	308
Notice of Appeal	310
Bond for Costs on Appeal	311
Statement of Points on Which Defendants Intend to Rely on the Appeal	313
Motion and Order as to Original Exhibits	315
Order Extending Time for Filing Record on Appeal	319
Motion Requesting Ninety Days Extension of Time With Which to Have Transcript of Record Printed	320
Order Extending Time for Printing	321
Clerk's Certificate	322

1A REQUEST OF APPELLANT THAT ONLY CERTAIN PORTIONS OF THE RECORD BE PRINTED

Filed - September 11, 1956

(Caption Omitted)

TO THE CLERK OF SAID COURT:

Appellants respectfully request that only the following designated portions of the transcript of the record on appeal be printed:

Page	*Instrument*
4	Caption Sheet
5	Second Amended Complaint
20	Defendants' First Amended Original Answer
470	Court's Findings of Fact and Conclusions of Law.
496	Final Judgment
519	Defendants' notice of appeal.
520	Defendants' appeal Bond.

WILLETT WILSON
Willett Wilson, Attorney for Appellants

I, Willett Wilson, Counsel of Record for Appellants, certify that a copy of the above Request has been sent by United States Mail to Mr. Thad Grundy, Counsel of Record for Appellee, this 4th day of September, 1956.

WILLETT WILSON
Willett Wilson

1B APPELLEE'S REQUEST FOR THE PRINTING OF ADDITIONAL PORTIONS OF THE RECORD

Filed - September 11, 1956

TO THE HONORABLE CLERK OF SAID COURT:

H. A. Phillips, Trustee, appellee herein, respectfully requests that the following additional portions of the record on appeal in the above captioned cause be printed:

Instrument	*Page of Clerk's Transcript*
Appellant's designation of contents of record on appeal	1
Appellee's designation of contents of record on appeal	3
Request for admissions	17
Stipulation of counsel	31
Minutes of annual meeting of Board of Directors	33
Order for separate trial	39
Reporter's transcript of testimony	41-469
Statement of points on which appellants intend to rely on appeal	521
Motion and order as to original exhibits	523
Order extending time for filing record on appeal	527
Appellee's Request for printing of record	
Appellee's request for printing of additional portions of record	

DATED at Houston, Texas, this 10 day of September, 1956.

THAD GRUNDY
Attorney for Appellee
539 San Jacinto Building
Houston 2, Texas

A copy of the foregoing Request has been served by mail upon Willett Wilson, the attorney of record for appellants, at his office in 1114 Texas Avenue Building, Houston 2, Texas, this 10 day of September, 1956.

THAD GRUNDY
Thad Grundy

1D APPELLEE'S AMENDED REQUEST FOR PRINTING OF ADDITIONAL PORTIONS OF THE RECORD

Filed September 17, 1956

(Caption Omitted)

TO THE HONORABLE CLERK OF SAID COURT:

H. A. Phillips, Trustee, appellee herein, respectfully requests that the following additional portions of the record on appeal in the above captioned cause be printed:

Instrument	*Page of Clerk's Transcript*
Appellant's designation of contents of record on appeal	1
Appellee's designation of contents of record on appeal	3

Request for admissions	17
Stipulation of counsel	31
Minutes of annual meeting of Board of Directors	33
Order for separate trial	39
Reporter's transcript of testimony	
Testimony of Holt P. Daniels	65-126
Testimony of Holt P. Daniels	147-268
Testimony of Phillip D. Hinton	268-292
Testimony of Holt P. Daniels	292-346
Testimony of Mary Alice Dionne	346-352
Testimony of Edwin I. Davis	359-395
Testimony of H. A. Phillips	395-401
Paragraphs VI and VIII of defendants original answer	415-418
Statement of points on which appellants intend to rely on appeal	521
Motion and order as to original exhibits	523
Order extending time for filing record on appeal	527
Appellee's request for printing of record	
Appellee's amended request for printing of additional portions of record	

DATED at Houston, Texas, this 12 day of September, 1956.

(Signed) THAD GRUNDY
Thad Grundy
Attorney for Appellee
539 San Jacinto Building
Houston 2, Texas

A copy of the foregoing Request has been served by mail upon Willett Wilson, the attorney of record for appellants,

at his office in 1114 Texas Avenue Building, Houston 2, Texas, this 12 day of September, 1956.

(Signed) THAD GRUNDY
Thad Grundy

1 APPELLANTS' DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(filed, June 18, 1956)

(Caption Omitted)

To The Honorable District Court:

Pursuant to Rule 75(g) of the Federal Rules of Civil Procedure, United Towing Co. et al., defendants-appellants, hereby designate the following portions of the record to comprise the transcript on appeal:

	File Date	*Instrument*
1.	11/4/55	Second Amended Complaint
2.	11/14/55	Defendants' First Amended Original Answer
3.	11/21/55	Motion for Judgment in Favor of Defendants
4.	12/29/55	Copy of reporter's transcript of the evidence or proceeding in open court cluding objections by counsel and rulings of the court.

5.	3/14/56	Court's Findings of Fact and Conclusions of Law.
6.	3/24/56	Defendants' Motion for New Trial.
7.	3/26/56	Notice of Motion for New Trial
8.	4/2/56	Judgment
9.	4/25/56	Plaintiff's Reply to Defendant' Motion for New Trial
10.	5/2/56	Defendants' Answer to Plaintiff's Reply to their Motion for New Trial
11.	5/7/56	Order Denying Motion for New Trial
12.		All Original exhibits of Plaintiff and Defendants
13.	6/1/56.	Defendants' notice of appeal.
14.	6/1/56	Defendants' appeal bond
15.		Statement of Points on Appeal
16.		This Designation of the contents of the Record or Appeal, showing the date of service of a copy hereof upon counsel for the plaintiff-appellee.

WILLETT WILSON
Willett Wilson Attorney for Appellants

I Willett Wilson Counsel of Record for Appellants, certify that a copy of the above designation has been sent by United State Mail to Mr. Thad Grundy Counsel of Record for Appellee, contemporaneously with its filing.

WILLETT WILSON
Willett Wilson

3. APPELLEE'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(filed, June 26, 1956)

(Caption Omitted)

To The Honorable District Court:

H. A. Phillips, Trustee, Plaintiff and Appellee in the above captioned cause, hereby designate the following additional portions of the record to be included in the transcript of said record on appeal:

	Instrument	*File Date*
1.	Plaintiff's Request for Admissions	11/3/55
2.	Stipulation of Counsel	11/16/55
3.	Order for Separate Trial	2/ /56

THAD GRUNDY
Thad Grundy
Attorney for H. A. Phillips,
Trustee, Plaintiff & Appellee

A true copy of the foregoing designation has been duly served upon Willett Wilson, Counsel for the Appellants in the above captioned matter, at his office in the Texas Avenue Building, this 25 day of June, 1956.

THAD GRUNDY
Thad Grundy

CAPTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOLDING SESSIONS AT HOUSTON

No, 8648 Civil Action

H. A. PHILLIPS, TRUSTEE,

-vs-

UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES and HOLT [illegible]DANIELS.

BE IT REMEMBERED: That in the above entitled and numbered cause, lately pending in said Court, in which a Judgment was rendered at the Regular February 1956 Term of said Court, to-wit: On the 2nd day of April A. D. 1956, the Honorable T. M. Kennerly, Judge of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

5 SECOND AMENDED COMPLAINT

(Title Omitted)

(filed, Nov. 4, 1955)

TO THE HONORABLE DISTRICT COURT:

Now comes H. A. PHILLIPS, Trustee of the Estate of C. J. Dick Towing Company, Bankrupt, hereinafter called "plaintiff" complaining of United Towing Company, Greens Bayou Marine Service Company, John D. Jones and Holt P. Daniels, hereinafter called "defendants," and leave of Court being first had and obtained, files this second amended complaint, and for cause of action would respectfully show unto the Court:

I.

Plaintiff, H. A. Phillip, is the duly qualified and acting Trustee of the Estate of C. J. Dick Towing Company, bankrupt, in that certain proceeding entitled "In the Matter of C. J. Dick Towing Company, Bankrupt, In Bankruptcy No. 2343," pending in the United States District Court for the Southern District of Texas, Houston Division. Defendant, United Towing Company, is a corporation with an office and place of business at 1310 McKinney Avenue, in Houston, Harris County, Texas, wherein service of process may be had upon John D. Jones, an officer and director of said corporation. Defendant, Greens Bayou Marine Service Company, is a corporation with an office and place of business at 1310 McKinney Avenue, in Houston, Harris County, Texas, wherein service of process may be had upon John D. Jones, an officer and director of said corporation. Defendants, John D. Jones and Holt P. Daniels, are individuals, who may be found for service of process

at 1310 McKinney Avenue, in Houston, Harris County, Texas. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

Prior to October 1, 1953, C. J. Dick Towing Company, said bankrupt, was the owner of all of the capital stock of the defendant, Greens Bayou Marine Service Company, hereinafter referred to as "Greens Bayou," which said capital stock had a fair value of more than One Hundred Thousand Dollars ($100,000.00). The said Greens Bayou was then and is now the owner of the record title to a tract of land comprising approximately 18-1/2 acres, situated in the J. W. Parker Subdivision, Harris and Wilson Survey, Harris County, Texas, and more particularly described as follows:

All that certain property belonging to C. J. Dick, Trustee, and situated on Green's Bayou in Harris County, Texas, consisting first of approximately 16.3 acres in the J. W. Parker Sub-division, in the Harris and Wilson Survey, originally designated as Lots 7-12, Block 43, Lots 7-12, Block 44, Lots 7-12, Block 45, Lots 7-12, Block 46, Lots 7-12, Block 47, Lots 1-12, Block 48, Lots 1-12, Block 49, Lots 7-12, Block 50, Lots 7-12, Block 51, and also all the fractional blocks numbered 62, 62, 64 and 65, in said sub-division, together with all of the abandoned streets and alleys adjacent to the above described properties owned by grantor, which were closed and abandoned by act of the Commissioner's Court of Harris County, Texas, on August 14, 1942; comprising 16.3 acres, more or less; also Lots 5 and 6, Block 45, Lots 5 and 6, Block 46, Lots 5 and 6, Block 47, in said sub-division, together with the buildings and equipment situated thereon or appurtenant thereto, and being the same tract of land conveyed to Greens Bayou Marine Service

Company by C. J. Dick, Trustee, by deed dated October 4, 1948, and filed for record in Volume 1832, Page 410, of the Deed Records of Harris County, Texas, to which instrument and the record thereof reference is hereby made.

On or about October 1, 1953, the bankrupt transferred all of the said shares of capital stock of Greens Bayou, as well as certain notes and accounts receivable belonging to Greens Bayou, to defendant, United Towing Company, in satisfaction of an alleged debt owing to defendant from said bankrupt, which alleged debt was in an amount substantially less than the fair market value of the aforesaid assets so conveyed by the bankrupt.

III.

At the time of said transfer, C. J. Dick Towing Company, said bankrupt, owed current liabilities, in the form of notes and accounts payable, of more than Five Hundred Thousand Dollars ($500,000.00), as well as various other indebtedness in large amounts, all of which greatly exceeded its assets. The said bankrupt was then, as it was at all times material hereto, hopelessly insolvent.

IV.

C. J. Dick Towing Company was duly adjudicated bankrupt on a petition filed against it on the 26th day of February, 1954, in the Southern District of Texas, Houston Division, as aforesaid. Plaintiff was appointed trustee of said bankrupt on the 29th day of March, 1954, and qualified and is now acting as such Trustee.

V.

At all times material hereto, defendant, John D. Jones, was president of the said bankrupt, C. J. Dick Towing

Company; president of defendant, United Towing Company; and president of Greens Bayou Marine Service Company. Said defendant Jones was also a director of each of said corporations, and was the owner of one-third of the capital stock of said bankrupt and of a substantial amount of the capital stock of United. At all times material hereto, defendant, Holt P. Daniels, was secretary and treasurer of the said bankrupt, C. J. Dick Towing Company; secretary and treasurer of defendant, United Towing Company; and secretary and treasurer of Greens Bayou. Said defendant Daniels was also a director of each of said corporations, and was the owner of one-third of the capital stock of said bankrupt and a substantial amount of the capital stock of United. One Harland I. Casteel, an attorney residing in Pittsburg, Pennsylvania, was at all times material hereto the vice-president and a director of said bankrupt, of United, and of Greens Bayou, and was the owner of the remaining one-third of the capital stock of said bankrupt and of a substantial amount of the capital stock of United. Plaintiff would further show that Jones, Daniels, and Casteel were the only officers and directors of C. J. Dick, United, and Greens Bayou, at all times material hereto. The said Casteel, throughout such period of time, was employed by the bankrupt as an attorney on a retainer basis, and also on some type of commission basis, the nature of which is unknown to plaintiff, from which he derived substantial income. The said defendants, Jones and Daniels, acting in unison with their pliant cohort and employee, Casteel, manipulated their activities freely under the guise of the aforesaid corporate entities so as to render said corporate entities mere shells, which were used to conceal the true fact that said corporations, together with John D. Jones, Inc., and Globe Towing Company, which were other cor-

porate shells created by defendants and Casteel, were being used by them to cover their individual operations. There was a commingling of the assets and liabilities of the several corporations in such a manner that this Honorable Court, in the exercise of its equitable powers, should disregard the pretense of corporate entities and look through the false shell thereby created to ascertain the realities of the relationships and the transactions herein involved. The said defendants, Jones and Daniels, personally supervised, directed, and participated in a fraudulent plan or scheme to manipulate the affairs of the above described corporations so that one of the principal assets of said bankrupt, to-wit, the real property hereinabove described-ownership of which was represented by ownership of all of the capital stock of Greens Bayou—would be withdrawn from the control of said bankrupt and placed beyond the reach of its creditors, under the domination and control of the individual defendants, Jones and Daniels.

VI.

Plaintiff would further show that C. J. Dick Towing Company transferred to defendant, United Towing Company, the above described shares of capital stock of Greens Bayou Marine Service Company subsequent to October 1, 1953, and within four months of the filing of the petition in bankruptcy against it. Said transfer was made to secure an antecedent indebtedness of C. J. Dick Towing Company to said defendant, and was made at a time when the said bankrupt was insolvent; and the defendant, as well as its officers, agents and employees acting with reference thereto, then had reasonable cause to believe that the said bankrupt was insolvent. The effect of said transfer was to enable the said defendant to obtain a greater percentage of its debt than some other creditor of the same class.

VII.

Pleading further in the alternative, plaintiff would show that on or about the 1st day of October, 1953, and within one year of the filing of the petition in bankruptcy against it, the said bankrupt, C. J. Dick Towing Company, transferred to defendant, United Towing Company, all of the shares of capital stock of Greens Bayou Marine Service Company, as hereinabove set forth. At the time of said transfer there were in existence creditors of said bankrupt, having claims against said bankrupt, provable under the Bankruptcy Act, and which claims were in existence at the time of said transfer. The said transfer was made by the bankrupt without fair consideration, in that the value of said capital stock was greater than the alleged antecedent debt thus satisfied, and said transfer rendered the said C. J. Dick Towing Company insolvent.

VIII.

Pleading further in the alternative, plaintiff would show that on or about the 1st day of October, 1953, and within one year of the filing of the petition in bankruptcy against it, the said bankrupt, C. J. Dick Towing Company, transferred to defendant, United Towing Company, all of the shares of capital stock of Greens Bayou Marine Service Company, as hereinabove set forth. At the time of said transfer there were in existence creditors of said bankrupt having claims against said bankrupt, provable under the Bankruptcy Act, and which claims were in existence at the time of said transfer. The said transfer was made by the bankrupt without fair consideration, in that the value of said capital stock was greater than the alleged antecedent debt thus satisfied, and said transfer was made while C. J. Dick Towing Company was insolvent.

IX.

Pleading further in the alternative, plaintiff would show that on or about the 1st day of October, 1953, and within one year of the filing of the petition in bankruptcy against it, C. J. Dick Towing Company, said bankrupt, transferred to defendant, United Towing Company, all of the shares of capital stock of Greens Bayou Marine Service Company, as hereinabove set forth. At the time of said transfer there were in existence creditors of said bankrupt having claims against said bankrupt, provable under the Bankruptcy Act, and which claims were in existence at the time of said transfer. Subsequent to said transfer, other persons, firms and corporations became creditors of the said bankrupt during the continuance of its business, and have filed claims against it which were provable under the Bankruptcy Act. Said transfer was made without fair consideration by the said C. J. Dick Towing Company, which was then engaged and did thereafter continue to engage in such business, for which the property remaining in its hands was an unreasonably small capital.

X.

Pleading further in the alternative, plaintiff would show that on or about the 1st day of October, 1953, and within one year of the filing of the petition in bankruptcy against it, the said bankrupt, C. J. Dick Towing Company, transferred to defendant, United Towing Company, all of the shares of capital stock of Greens Bayou Marine Service Company, as hereinabove set forth. At the time of said transfer there were in existence creditors of said bankrupt having claims against said bankrupt, provable under the Bankruptcy Act. Said transfer was made without fair con-

siderations by the said C. J. Dick Towing Company, which intended to incur and believed that it would incur debts beyond its ability to pay as they matured.

XI.

Pleading further in the alternative, plaintiff would show that on or about the 1st day of October, 1953, and within one year of the filing of the petition in bankruptcy against it C. J. Dick Towing Company, said bankrupt, transferred to defendant, United Towing Company, all of the shares of capital stock of Greens Bayou Marine Service Company, as hereinabove set forth. At the time of said transfer there were in existence creditors of said bankrupt having claims against said bankrupt, provable under the Bankruptcy Act, and which claims were in existence at the time of said transfer. Subsequent to said transfer, other persons, firms, and corporations became creditors of said bankrupt, and have filed claims against it which were provable under the Bankruptcy Act. Said transfer was made by the said C. J. Dick Towing Company with actual intent to hinder, delay and defraud its then existing and future creditors.

XII.

Pleading further in the alternative, plaintiff would show that on or about the 1st day of October, 1953, C. J. Dick Towing Company, said bankrupt, transferred to defendant, United Towing Company, all of the shares of capital stock of Greens Bayou Marine Service Company, as hereinabove set forth. Said transfer was made with intent to delay, hinder, or defraud creditors of said bankrupt from what they were lawfully entitled to, and was then and is now void as to such creditors. If plaintiff be mistaken

in his allegation that said transfer was made on or about October 1, 1953, he would show that said transfer took place some time between January 1, 1952, and October 1, 1953.

XIII.

Pleading further in the alternative, plaintiff would show that on or about the 1st day of October, 1953, C. J. Dick Towing Company, said bankrupt, transferred to defendant, United Towing Company, all of the shares of capital stock of Greens Bayou Marine Service Company, as hereinabove set forth. Said transfer was made by the bankrupt upon a consideration not deemed valuable in law, and at a time when said bankrupt was not then possessed of property within the State of Texas, subject to execution, sufficient to satisfy its existing debts. If plaintiff be mistaken in his allegation that said transfer was made on or about October 1, 1953, he would show that said transfer was made sometime between January 1, 1952, and October 1, 1953.

XIV.

Plaintiff would further show that by reason of the fact that defendant, Jones and Daniels, and the said Harland I. Casteel constituted the entire board of directors of the bankrupt, C. J. Dick Towing Company, and the entire board of directors of the defendant, United Towing Company, at the time of the transfers and acts herein complained of, the said Jones, Daniels and Casteel represented dual and adverse interests and were thereby disqualified to vote on any corporate resolutions or otherwise to act with respect to any transfers by the bankrupt to United Tow-

ing Company, whether in satisfaction of an alleged indebtedness or otherwise. As a result of the breach by Jones, Daniels and Casteel of such fiduciary relationships, both to C. J. Dick Towing Company and United Towing Company, the said transfer of the capital stock of Greens Bayou to United was and is absolutely void, and should be cancelled and set aside. Likewise, by reason of their personal financial interest in the affairs of United Towing Company through their ownership of substantial amounts of stock in said corporation, the said Jones, Daniels and Casteel were additionally disqualified and incapacitated to act with respect to said transfer of capital stock, and any and all contracts or agreements made by them as directors and officers of C. J. Dick Towing Company with themselves as directors and officers of United Towing Company were and are against public policy, and were and are void and unenforceable against the said C. J. Dick Towing Company, and should be cancelled and set aside.

XV.

Plaintiff would further show that at the time that said defendants caused the capital stock of Greens Bayou to be transferred by C. J. Dick Towing Company to United Towing Company, the said C. J. Dick Towing Company was badly in need of money with which to continue its operations, and was not able to obtain funds for working capital from any source whatsoever. If the said capital stock had been sold at such time, the sale thereof would necessarily have been a forced or sacrifice sale, and the bankrupt would have realized only a fraction of the true value of said stock. All of these facts were well known to the defendants, and especially to the defendant, Jones, who, as

president and director of both the bankrupt and the defendant, United Towing Company, dominated and controlled the affairs of both corporations. The insistence by United on the transfer of Greens Bayou stock from C. J. Dick to it under such circumstances created a situation in which said bankrupt, as a practical matter, had no freedom of choice to decide whether it should or should not convey said capital stock to United, and constituted a form of economic duress which prevented the formation of a valid contract between the parties and rendered such transfer of capital stock voidable at the election of the bankrupt. Plaintiff would also show that the domination of C. J. Dick, Greens Bayou and United by defendant, Jones, for his own personal profit and in direct violation of his fiduciary relationship to each of said corporations, led to the obtaining by Jones of advantages and personal gain for himself, by reason of the fact that the said bankrupt had no opportunity to exercise its freedom of choice in the matter, and constituted the exercise of undue influence upon said bankrupt by defendant, Jones, thereby rendering said contract voidable. Plaintiff hereby declares that said contract was voidable, and prays for the return of said Greens Bayou stock.

XVI.

On or about April 3, 1953, Greens Bayou Marine Service Company entered into an agreement with Texas Shipbuilding Company, a corporation, whereby Greens Bayou leased the 18-1/2 acres of real property and improvements hereinabove described to Texas Shipbuilding for a period of five (5) years, at a rental of $900.00 per month, with an option in the lease to renew and extend said lease for an additional five (5) years, at a rental of $1200.00 per

month. Said lease also granted an option to the lessee to purchase said property for the sum of $250,000.00. Texas Shipbuilding thereafter assigned and subleased portions of said property to various other firms and corporations, including J. L. (Roy) Newlin, Inc., which was still another corporation dominated and controlled by Jones as president, director, and stockholder thereof. Said lease and the various subleases thereof are still in force, and defendants Jones, Daniels, and Greens Bayou have been collecting said rental at the rate of $900.00 per month since May 1, 1953, no part of which has ever been paid to or for the benefit of C. J. Dick Towing Company. Plaintiff alleges that he is entitled to recover from each and all of said defendants all of the rentals so collected by them, as well as any and all other profits realized from their control and operation of Greens Bayou and its property, for which demand is hereby made.

XVII.

Plaintiff alleges that the capital stock of Greens Bayou is a valuable asset, evidencing, as it does, control of the record title to the aforesaid 18-1/2 acres of land in Harris County, Texas, which is subject to a profitable lease; that said real property has a present fair market value in Houston, Harris County, Texas, of not less than $150,000.00; that the encumbrances against said property do not exceed $25,000.00; that said asset rightfully belongs to the Estate of C. J. Dick Towing Company, said bankrupt, from which it was wrongfully and fraudulently transferred by the defendants; and that said asset, or the fair market value thereof, should be returned to the Estate of said bankrupt, to be administered for the benefit of all of its creditors.

WHEREFORE, premises considered, plaintiff prays that defendants be cited to appear and answer herein, and that on final hearing hereof (1) that the above described transfer of all of the shares of capital stock of Greens Bayou Marine Service Company by the bankrupt to the defendant, United Towing Company, be declared null and void and cancelled and set aside by the Court; (2) that defendant, United Towing Company, be required to transfer and deliver said shares of capital stock to plaintiff; or, in the alternative, that plaintiff have judgment against each and all of said defendants, individually, jointly and severally, for the fair value of said shares of capital stock, with interest thereon at the rate of six percent (6%) per annum from the date of such transfer to date of judgment; (3) that plaintiff have judgment against each and all of said defendants, individually, jointly and severally, for the rents collected by them from the lease of said property from May 1, 1953, to date of judgment; (4) that plaintiff recover his costs herein expended; and (5) that plaintiff have such other relief, at law or in equity, to which he may show himself justly entitled.

THAD GRUNDY
Attorney for H. A. Phillips, Trustee, Plaintiff
539 San Jacinto Building
Houston 2, Texas

A true copy of the foregoing Second Amended Complaint was served upon defendants herein by delivering the same to Willett Wilson, their attorney of record, at his offices in 1114 Texas Avenue Building, Houston 2, Texas, this 4th day of November, 1955.

THAD GRUNDY

17 REQUEST FOR ADMISSIONS

(Title Omitted)

(filed, Nov. 4, 1955)

TO: UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES, HOLT P. DANIELS, and WILLETT WILSON, their attorney of record:

REQUEST IS HEREBY MADE that, within ten days after service of this request, you admit the truth of the following statements, for purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial of said actions:

1.

That John D. Jones was the president, a director, and a stockholder of C. J. Dick Towing Company, at all times between December 1, 1952, and October 1, 1953.

2.

That Harland I. Casteel was the vice-president, a director and a stockholder of C. J. Dick Towing Company at all times between December 1, 1952, and October 1, 1953.

3.

That Holt P. Daniels was the secretary, a director, and a stockholder of C. J. Dick Towing Company at all times between December 1, 1952, and October 1, 1953.

4.

That John D. Jones was the president, a director, and a stockholder of United Towing Company at all times between December 1, 1952, and October 1, 1953.

5.

That Harland I. Casteel was the vice-president, a director and a stockholder of United Towing Company at all times between December 1, 1952, and October 1, 1953.

6.

That Holt P. Daniels was the secretary, a director and a stockholder of United Towing Company at all times between December 1, 1952, and October 1, 1953.

7.

That John D. Jones was the president and a director of Greens Bayou Marine Service Company at all times between December 1, 1952, and October 1, 1953.

8.

That Harland I. Casteel was the vice-president and a director of Greens Bayou Marine Service Company at all times between December 1, 1952, and October 1, 1953.

9.

That Holt P. Daniels was the secretary and a director of Greens Bayou Marine Service Company at all times between December 1, 1952, and October 1, 1953.

10.

That there were no other directors of C. J. Dick Towing Company between December 1, 1952, and October 1, 1953.

11.

That there were no other directors of United Towing Company between December 1, 1952, and October 1, 1953.

12.

That there were no other directors of Greens Bayou Marine Service Company between December 1, 1952, and October 1, 1953.

THAD GRUNDY
Attorney for Plaintiff
539 San Jacinto Building
Houston 2, Texas

A true copy of the foregoing Request for Admissions was served upon defendants herein by delivering the same to Willett Wilson, their attorney of record, at his offices in 1114 Texas Avenue Building, Houston 2, Texas, this 3rd day of November, 1955.

THAD GRUNDY

20 DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER

(Title Omitted)

(filed, Nov. 14, 1955)

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

With leave of the Court first had, UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES and HOLT P. DANIELS,

hereinafter called defendants in the above cause, file this their First Amended Original Answer to the Second Amended Complaint of H. A. PHILLIPS, TRUSTEE, hereinafter called plaintiff, and respectfully represent as follows:

I.

The averments of Paragraph 1 are admitted except that Holt P. Daniels does not office at 1310 McKinney Avenue, Houston, Texas.

II.

The averments of Paragraph II are denied except as admitted hereafter:

On December 1, 1952, C. J. Dick Towing Company owed United Towing Company $35,003.94 and was badly in need of operating capital. An agreement was reached whereby C. J. Dick Towing Company pledged its Greens Bayou Marine Service Company stock as security for its past indebtedness and for an additional cash advance of $88,500.00. In December of 1952 and January, 1953, other advances of credit in the amount of $3,000.00 were made to C. J. Dick Towing Company by United Towing Company upon the same security. $22,096.16 was repaid by net credits on the indebtedness by C. J. Dick Towing Company during the balance of the months of December, 1952, and January, 1953, leaving a balance due United Towing Company by C. J. Dick Towing Company of $104,407.78.

United Towing Company considered this figure far exceeded the value of the Greens Bayou stock and demanded additional guarantee of payment. C. J. Dick Towing Company advised United Towing Company that no payment in excess of $20,000.00 could be made before June 30,

1953. This being unacceptable to United Towing Company, United Towing Company offered to cancel and extinguish the sums due it on June 30, 1953, in the then amount of $104,407.78 less whatever sums C. J. Dick Towing Company was able to repay in the interim period (it being contemplated by the parties that this amount would not exceed a principal sum of $20,000.00 and which amount United Towing Company needed on or before June 30, 1953, in the conduct of its business) in exchange for the transfer to United Towing Company of full title to the common stock in Greens Bayou Marine Service Company, (which it held by pledge as collateral to secure its loans to C. J. Dick Towing Company) together with C. J. Dick Towing Company's note receivable from Greens Bayou Marine Service Company in the amount of $15,000.00 and the account receivable from Greens Bayou Marine Service Company owing to C. J. Dick Towing Company on October 1, 1953, in whatever amount was owing on that date.

On January 26, 1953, at the annual meeting of the Directors of C. J. Dick Towing Company, they were informed that United Towing Company was demanding additional guarantee of payment of its indebtedness, but would cancel and extinguish the indebtedness less whatever sum C. J. Dick Towing Company could repay in the period before June 30, 1953, in exchange for a complete transfer of the Greens Bayou Marine Service Company common stock pledged, and C. J. Dick Towing Company's note and accounts receivable from Greens Bayou Marine Service Company, in whatever amount was owing on October 1, 1953.

The full settlement proposition in exchange for transfer of the complete title to the pledged stock was accepted

by C. J. Dick Towing Company, because it needed to keep all its cash for operating expenses and if it used it to repay United Towing Company, it would have had to go out and borrow again on the Greens Bayou Company's stock and it was very doubtful if it could borrow as much cash on the stock as it would have to pay United Towing Company to secure its release from the pledge, and the President and Secretary were authorized to discharge the indebtedness to United Towing Company in the manner outlined by the execution of appropriate instruments of transfer and assignment to United Towing Company.

C. J. Dick Towing Company, as was agreed, paid back to United Towing Company $22,129.98, leaving a balance on the United Towing Company account of $82,177.80, which, though still more than the net value of the Greens Bayou Marine Service Company stock (since the 16.63 acres it represented was encumbered with a $20,000.00 mortgage and an additional $7,000.00 debt due by Greens Bayou Marine Service Company, plus taxes in the approximate amount of $3,000.00, was the amount that United Towing Company had agreed to accept the stock in exchange for.

Greens Bayou Marine Service Company's only asset was its ownership of approximately sixteen and 63/100 (16.63) acres of non-income producing land on which there was a mortgage, payable monthly, in the total approximate amount of $20,000.00. United Towing Company, although not assuming the balance due on the mortgage on the approximate 16.63 acres of land when it agreed to take the stock in exchange for its debt, knew that the payments on the mortgage would have to be continued to protect the stock and the property. In addition, at this

time Greens Bayou Marine Service Company owed the property mortgagee an additional $7,000.00 for some equipment in addition to approximately $3,000.00 taxes, which United Towing Company knew would also have to be paid and thereby must be considered part of the purchase price. The full settlement offer be came a binding contract between the two companies when accepted by C. J. Dick Towing Company on January 26, 1953, and approved by the United Towing Company on February 6, 1953, but the actual surrender of the Greens Bayou Marine Service Company pledged stock for a new certificate, it was agreed, was to be postponed until October 1, 1953, for tax purposes. United Towing Company on October 1, 1953, pursuant to its full settlement agreement with C. J. Dick Towing Company, exchanged the Greens Bayou Marine Service Company stock that it held as collateral for a new certificate issued in the name of United Towing Company and in whose name it is held at present.

At all times material to this suit Greens Bayou Marine Service Company was and still is the owner of the approximate 16.63 acres of land situated in the J. W. Parker Sub-division, Harris and Wilson Survey, Harris County, Texas, subject to the balance due on the mortgage, and to the mortgagee.

III.

The averments of Paragraph III are denied, except as admitted hereafter:

On or about October 1, 1953, C. J. Dick Towing Company owed total liabilities in the approximate amount of $500,000.00 and owned equities and other assets which

in orderly sale would have brought more than enough to pay all current liabilities.

VI.

The averments of Paragraph IV are admitted.

V.

The averments of Paragraph V are denied, except as admitted hereafter:

It is admitted that at all times material hereto, defendant, John D. Jones, was president of the said bankrupt, C. J. Dick Towing Company; president of defendant, United Towing Company; and president of Greens Bayou Marine Service Company. Said defendant Jones was also a director of each of said corporations, and was the owner of one-third of the capital stock of said bankrupt and of a substantial amount of the capital stock of United Towing Company. At all times material hereto, defendant, Holt P. Daniels was secretary and treasurer of the said bankrupt, C. J. Dick Towing Company; secretary and treasurer of defendant, United Towing Company; and secretary and treasurer of Greens Bayou Marine Service Company. Said defendant Daniels was also a director of each of said corporations, and was the owner of one-third of the capital stock of said bankrupt and a substantial amount of the capital stock of United Towing Company. One Harland I. Casteel, an attorney residing in Pittsburg, Pennsylvania, was at all times material hereto the vice-president and a director of said bankrupt, of United Towing Company, and of Greens Bayou Marine Service Company, and was the owner of the remaining one-third of

the capital stock of said bankrupt and of a substantial amount of the capital stock of United Towing Company.

VI.

The averments of Paragraph VI are denied.

VII.

The averments of Paragraph VII are denied except as hereinafter admitted:

C. J. Dick Towing Company pledged its shares of Greens Bayou Marine Service Company stock to United Towing Company on or about December 1, 1952, to secure a debt of $35,003.94 and for additional cash advances of $88,500.00. C. J. Dick Towing Company on January 26, 1953, agreed to surrender its redemption rights to the Greens Bayou Marine Service Company stock in release of its debt to United Towing Company, but the actual surrender by United Towing Company of the Greens Bayou Marine Service Company pledged stock certificate for a new certificate in its name was to to be postponed to October 1, 1953, for tax purposes.

VIII.

The averments of Paragraph VIII are denied except as hereinafter admitted:

Same statement as under Paragraph VII.

IX.

The averments of Paragraph IX are denied except as hereinafter admitted:

Same statement as under Paragraph VII.

Defendants admit that subsequent to said transfers of the Greens Bayou Marine Service Company stock on December 1, 1952, and October 1, 1953, other persons, firms and corporations became creditors of the said bankrupt during the continuance of its business, and have filed claims against it which were proved under the Bankruptcy Act.

X.

The averments of Paragraph X are denied except as hereinafter admitted:

Same statements as under Paragraph VII, and IX.

XI.

The averments of Paragraph XI are denied except as hereinafter admitted:

Same statement as under Paragraphs VII and IX.

XII.

The averments of Paragraph XII are denied except as hereinafter admitted:

Same statement as under Paragraphs VII and IX.

XIII.

The averments of Paragraph XIII are denied except as hereinafter admitted:

Same statement as under Paragraphs VII and IX.

XIV.

The averments of Paragraph XIV are denied.

XV.

The averments of Paragraph XV are denied except as hereinafter admitted:

Defendants admit that at the time the Greens Bayou Marine Service Company stock was pledged by C. J. Dick Towing Company to United Towing Company to secure the $88,500.00 additional cash advances, the said C. J. Dick Towing Company was in need of money with which to continue its operations and had not been able to obtain sufficient funds for working capital from any other source.

XVI.

The averments of Paragraph XVI are denied except as hereinafter admitted:

Defendants admit the lease agreement of April 3, 1953, between Greens Bayou Marine Service Company and Texas Ship Building Company, except that the property involved was 16.63 acres, more or less; that said lease is at present still in force, that J. L. (Roy) Newlin, Inc. has subleased a portion of the property as well as other firms and corporations; that Greens Bayou Marine Service Company has been collecting said rental at the rate of $900.00 per month since it acquired its sublease from Texas Ship Building Company; that no part of which has ever been paid to C. J. Dick Towing Company. Defendants further allege that said $900.00 per month rent has been used to pay on the purchase money mortgage against the property as well as the amount due the seller of the property, in payment of interest on the indebtedness, taxes and restoration of deteriorating improvements.

XVII.

The averments of Paragraph XVII are denied except as hereinafter admitted:

Defendants admit that the capital stock of Greens Bayou Marine Service Company, although not as valuable as the cash advances made by United Towing Company, is a valuable asset, because with it would go the control of the title of the approximately 16.63 acres of land, subject, however, to the purchase money mortgage against it in the approximate amount of $20,000.00, and oustanding debts and property taxes of approximately $10,000.00. Defendants further state that the cash advances by United Towing Company and bills receivable owed by C. J. Dick Towing Company to it, both of which the stock was pledged to secure at the time of the cash advances and which United Towing Company later canceled in exchange for the stock rather than resort to foreclosure on the pledge, were valuable assets also and most valuable to C. J. Dick Towing Company in view of the fact that C. J. Dick Towing Company at the time, although having a substantial equity in much valuable floating equipment, such as tug boats and barges, was in need of operating capital and had found it impossible to borrow enough operating capital from any other source than United Towing Company on its Greens Bayou Marine Service Company stock, since the stock had no ready market, and neither stock nor the 16.63 acres of land it represented were income-bearing, said property being not under lease at that time, and C. J. Dick Towing Company having been unable to lease said property so as to derive a fair income from it.

XVIII.

Defendants deny that said C. J. Dick Towing Company was insolvent when it pledged the Greens Bayou Marine Service Company stock on December 1, 1952, to United Towing Company; defendants deny that C. J. Dick Towing Company was insolvent when the agreement was reached to surrender its right of redemption to United Towing in exchange for cancellation of its debt. Defendants deny that C. J. Dick Towing Company was insolvent when United Towing Company exchanged its pledged Greens Bayou Marine Service Company stock for a new certificate in its name under the agreement made in January and February of 1953.

The officers and directors of C. J. Dick Towing Company considered the pledge of its Greens Bayou Marine Service Company stock for quick cash advances of $88,500.00 a good business deal as it enabled C. J. Dick Towing Company to keep operating and making money which it could not do without sufficient operating capital and which it had been unable to secure from any other source. The officers and directors of C. J. Dick Towing Company considered the surrenuer of their right of redemption of the Greens Bayou Marire Service Company stock in full settlement of the debt for which the stock was pledged, a good trade as it enabled C. J. Dick Towing Company to hold on to its much needed operating capital. Prudent business dealings dictated that United Towing Company attempt to adequately secure its loan since it was lending good cash money secured by stock and real estate not readily marketable. Both companies considered they had made a good and fair trade, but as it turned out the security of stock was not worth as much as the cash advanced by the United Towing Company.

XIX.

Defendants would further show that all of the money which United Towing Company loaned to C. J. Dick Towing Company on the security of Greens Bayou Marine Service Company stock, went to pay current creditors and debts, and to keep the company operating, and said creditors of C. J. Dick Towing Company certainly were benefited as well as C. J. Dick Towing Company enabled to earn additional amounts of money because of United Towing Company's loan and later purchase of (instead of foreclosure on) the capital stock in the Greens Bayou Marine Service Company, in full settlement of the debt due it, for which the stock was pledged.

XX.

Defendants further say that agreements by C. J. Dick Towing Company to surrender its redemption rights in the Greens Bayou stock to United Towing Company in satisfaction of its debt, when accepted by United Towing Company on February 6, 1953, became a transaction perfected more than one year prior to bankruptcy proceedings of C. J. Dick Towing Company as far as any creditors of C. J. Dick Towing Company were concerned.

XXI.

Defendants would further say that the actual exchange on October 1, 1953, by United Towing Company of the Greens Bayou (pledged) stock certificate for a new certificate in its own name was a transaction perfected more than four months prior to the bankruptcy proceedings of C. J. Dick Towing Company.

XXII.

Defendants further say that the pledge of the Greens Bayou stock to United Towing Company by C. J. Dick Towing Company on December 1, 1952, was a transaction for a fair consideration perfected more than one year prior to bankruptcy proceedings of C. J. Dick Towing Company.

XXIII.

Defendants further say that if such above-stated agreement of February 6, 1953, between C. J. Dick Towing Company and United Towing Company, and if such exchange of pledged stock certificate by United Towing Company for the new certificate in its own name on October 1, 1953, pursuant to the February 6, 1953, agreement, were not transactions perfected prior to bankruptcy proceedings of C. J. Dick Towing Company, then United Towing Company is entitled to hold and have its pledgee's lien on the original pledged stock certificate as security for its money loaned to C. J. Dick Towing Company (more than one year prior to bankruptcy proceedings) on the collateral of said Greens Bayou stock Certificate, and to have its loan of $82,277.80 plus interest repaid in exchange for a release of the stock, or to have foreclosure of its lien, or the abandonment of the security to the United Towing Company for its debt.

WHEREFORE, defendants pray that the complaint filed by the plaintiff be dismissed, and that United Towing Company be quieted in its title to the Greens Bayou Marine Service Company stock, and that said mortgaged stock be abandoned (to United Towing Company) as an asset of C. J. Dick Towing Company, or in the alterna-

tive that it have foreclosure of its lien on said stock, and further, that judgment be entered in favor of defendants against plaintiff for all costs, and for such other and further relief as they may show themselves entitled.

WILLETT WILSON

Attorney for Defendants

1313 Texas Avenue Building
Houston 2, Texas
Telephone: CA 7-5168

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared WILLETT WILSON, known to me to be a credible person, who being by me first duly sworn, on oath did depose and say that he is attorney for the defendants in the above entitled and numbered cause, and that he personally served a true copy of the foregoing First Amended Original Answer of Defendants upon the plaintiff by leaving the same at the office of THAD GRUNDY, attorney of record for said plaintiff, at 539 San Jacinto Building, Houston, Texas, this the 14th day of November, 1955.

WILLETT WILSON

SUBSCRIBED AND SWORN TO before me this 14th day of November, 1955.

L. Berghrede
Notary Public in and for Harris
County, T E X A S

31

STIPULATION

(Title Omitted)

(filed, Nov. 16, 1955)

It is agreed and stipulated by and between the parties hereto as follows:

1. That the Minutes of the meeting of the Board of Directors of C. J. Dick Towing Company dated January 26, 1953, and attached hereto in two (2) typewritten pages, are the original minutes of said meeting, and that the signature thereon is the signature of Holt P. Daniels.

2. That the Call and Waiver of Notice of the said meeting of the Board of Directors of C. J. Dick Towing Company attached hereto in one (1) typewritten page is the original call and waiver of notice of said meeting, and that the signatures thereon are the signatures of John D. Jones, Holt P. Daniels, Harland I. Casteel, and Alice W. Dorflinger.

3. That the photostatic copy of an Agreement dated April 3, 1953, by and between Greens Bayou Marine Service Company and Texas Shipbuilding Co., Inc., and attached hereto in twelve (12) typewritten pages, is a true and correct copy of such agreement, and may be used on the trial of this cause without accounting for the original thereof.

4. That at all times prior to the date upon which the capital stock of Greens Bayou Marine Service Company was transferred to United Towing Company by C. J. Dick Towing Company, C. J. Dick Towing Company was the owner of all of the capital stock of Greens Bayou Marine Service Company.

5. That W. T. Peckinpaugh, Jr., a qualified real estate appraiser of Houston, Harris County, Texas, appraised the land and improvements described in Paragraph II of the Second Amended Complaint herein on January 12, 1955, and placed a value of $74,000.00 upon the land and a value of $13,951.00 upon the improvements; and that the said W. T. Peckinpaugh, Jr., if called as a witness in this cause, would so testify.

DONE at Houston, Texas, this 16 day of November, 1955.

H. A. PHILLIPS, *Trustee*

THAD GRUNDY
Attorney for Plaintiff

United Towing Company
Greens Bayou Marine
Service Company
John D. Jones
Holt P. Daniels

WILLETT WILSONO
Attorney for Defendants

33 C. J. DICK TOWING COMPANY

Minutes of Annual Meeting of Board of Directors held January 26, 1953.

Pursuant to call and waiver of notice signed by all of the Directors of C. J. Dick Towing Company, the annual meeting of the Board of Directors of the Company was held on January 26, 1953, at 3:30 P.M. at 1310 McKinney Avenue, Houston, Texas.

John D. Jones, President, called the meeting to order and Holt P. Daniels, Jr., Secretary and Treasurer, acted as Secretary of the meeting.

The following Directors of the Company were present and participated in the meeting:

John D. Jones
Holt P. Daniels, Jr.
Harland I. Casteel
Alice W. Dorflinger

Upon motion duly made, seconded, and unanimously carried, it was RESOLVED: that the same officers be re-elected. These officers are:

John D. Jones - President
H. I. Casteel - Vice-President
Holt P. Daniels, Jr. - Secretary
Alice W. Dorflinger - Ass't. Secretary
Holt P. Daniels, Jr. - Treasurer
Alice W. Dorflinger - Ass't. Treasurer

The minutes of the previous meeting of the Board of Directors were read and, on motion duly made and seconded, were approved.

John D. Jones, President of the Company, made a report with respect to the Company's activities during the past year and Holt P. Daniels, Jr., Secretary, made a report with respect to the Company's financial condition.

John D. Jones, President of the Company, stated to the meeting that the Company was indebted to United Towing Company at January 31, 1953, after all January transactions had been recorded in the approximate amount of

$105,000.00. The President further stated that United Towing Company in consideration of its substantial recent cash advances to C. J. Dick Towing Company had demanded that appropriate guarantee of payment be made. The President fully considered the matter with United Towing Company and after lengthy discussion during which it was recognized that some portion of the indebtedness would be paid by C. J. Dick Towing Company prior to June 30th, 1953, in the approximate amount of $20,000.00 during the ordinary course of business between the two companies, United Towing Company offered to cancel and extinguish the sums due it on June 30th, 1953, in the amount of approximately $105,000.00 less whatever sums C. J. Dick Towing Company is able to repay in the interim period in exchange for the transfer to United Towing Company on October 1, 1953 of the common stock in Greens Bayou Marine Service Company held by C. J. Dick Towing Company, C. J. Dick Towing Company's note receivable from Greens Bayou Marine Service Company in the amount of $15,000.00 and the account receivable from Greens Bayou Marine Service Company owing to C. J. Dick Towing Company on October 1, 1953, in whatever amount was owing on that date.

Upon lengthy discussion of these facts presented to the Board by the President with regard to indebtedness to United Towing Company the Board was of the opinion that the settlement proposed would result in conveyance of an equity in common stock worth about $95,000.00 together with notes and accounts receivable in excess of $35,000.00 for discharge of a debt amounting to about $85,000.00, however inasmuch as United Towing Company has advanced during the last sixty days, upon guar-

antee of sufficient security, sums of money in excess of $88,000.00 to secure the continued operation of C. J. Dick Towing Company and without which funds C. J. Dick Towing Company could not continue to exist there being no other source of capital available the Board.

RESOLVED that the President and Secretary and Treasurer be and hereby are authorized to accept the offer of United Towing Company and to discharge the indebtedness to United Towing Company in the manner outlined in these minutes by execution of appropriate instruments of transfer and assignment to United Towing Company.

There being no further business to transact, on motion duly made, seconded, and unanimously carried, the meeting adjourned.

Holt P. Daniels, Jr. - Secretary

C. J. DICK TOWING COMPANY

* * * * *

CALL AND WAIVER OF NOTICE FOR ANNUAL MEETING OF BOARD OF DIRECTORS

We, the undersigned, being all of the Directors of C. J. Dick Towing Company, do hereby call the annual meeting of Directors of said Company, to be held at 3:30 P.M. on January 26, 1953, at the offices of C. J. Dick Towing Company, 1310 McKinney Avenue, Houston, Texas, for the purpose of taking up the regular order of business and for doing all such other things as may be necessary or desirable in connection with the promotion of the business of the Company, and we hereby waive all statutory and by-law requirements as to notice of time,

place and object of said meeting, and consent to the transaction thereat of any and all business pertaining to the affairs of the Company.

Dated at Houston, Texas, January 26, 1953.

JOHN D. JONES
HOLT P. DANIELS, JR.
H. I. CASTEEL
ALICE W. DORFLINGER

(Agreement, dated April 3, 1953, omitted from record on appeal at the request of both counsel.)

39 ORDER FOR SEPARATE TRIAL

(Title Omitted)

(filed, Feb. 29, 1956)

At Houston, in said district, on the 29 day of February 1956.

It appearing to the Court that the claim and cause of action for rents and profits, asserted by plaintiff against defendants, John D. Jones, Holt P. Daniels, and Greens Bayou Marine Service Company in Paragraph XVI of the Second Amended Complaint on file herein, in furtherance of convenience, should be severed from the remaining claims and causes of action asserted in said Second Amended Complaint, and there being no objection thereto, it is, accordingly,

ORDERED that the claim and cause of action asserted by H. A. Phillips, Trustee, plaintiff, against John D. Jones,

Holt P. Daniels, and Greens Bayou Marine Service Company, defendants, for rents and profits allegedly collected and realized by said defendants from certain real property, all as more particularly alleged in Paragraph XVI of said Second Amended Complaint, be, and the same hereby is, severed from the remaining claims and causes of action asserted in said Second Amended Complaint; and it is further.

ORDERED that said cause of action as hereby severed shall be tried separately, and that all evidence heretofore taken and admitted in this cause, together with objections and exceptions thereto, may be considered by the Court at such separate trial of said severed cause of action, together with any other admissible evidence.

DISTRICT JUDGE

APPROVED AND AGREED TO:

THAD GRUNDY
Attorney for Plaintiff

WILLETT WILSON
Attorney for Defendants

53 Mr. Grundy: All three had the same directors and same officers and same stockholders — the same three stockholders owned all of the stock of C. J. Dick Towing Company and the subsidiary and the capital stock of United. The transfer is attacked upon that ground because it was against the public policy of the State of Texas because of the dual representation, and further by reason of the financial interest which Defendants John D. Jones

and Holt P. Daniels had in United Towing Company by reason of their stock ownership.

The trustee further attacks on the ground that at the time the transfer was made that the C. J. Dick Towing Company was financially embarrassed, very seriously embarrassed, without sufficient funds to obtain working capital. It could not obtain this working capital from any other source. By reason of the fact that it could not obtain funds for working capital, the transfer of this asset to United Towing Company in satisfaction of a large debt for previous advances constituted economic duress.

For that reason, the contract is voidable, is the allegation of the trustee of the C. J. Dick Towing Company, that the C. J. Dick Towing Company at the time the transfer was made did not have a freedom of choice. It had no alternative but to make this transfer, or else it would have been out of business at that time; therefore, the trustee declares the contract is voidable and declares his election to void, and asks that it be set aside.

Finally, the complaint alleges that the Green's Bayou Marine Service Company is the owner of the record title to a tract of land on Green's Bayou in Harris County fully described in the complaint.

The Court: Up to now you have been talking about stock.

Mr. Grundy: The capital stock. The element of the transfer was that capital stock of the subsidiary. The subsidiary in turn owned and still owns the record title to the tract of land described as 16-1/2 to 18-1/2 acres.

The Court: It is owned by the first subsidiary?

Mr. Grundy: Yes, the stock of which had been owned by C. J. Dick Towing Company. That tract of land con-

trolled by Green's Bayou has a fair market value, the trustee alleges, in excess of $150,000. The encumbrances against it does not exceed $25,000. The trustee alleges that the transfer was not for a fair consideration, in that the value of the capital stock was greater than the amount of the antecedent debt thus satisfied; * * *

57

Mr. Wilson: Your Honor, the defendants' position in this suit, and so alleged in the answer, is that there was a transfer, and a transfer by pledge under the Bankruptcy Act that pledges mortgages or actual assignments were all considered transfers, so we must distinguish.

There was a pledge back in December of 1952 of the Green's Bayou stock by C. J. Dick Towing Company, now in bankruptcy, to United Towing Company to secure a 35,000-dollar debt and an additional advance of $88,500 in cash. Our position is going to be that that was a completed perfected transfer back in December of 1952, more than one year before the filing of the involuntary petition in bankruptcy, which was on February the 26th, 1954.

Now, plaintiff has alleged, of course, in their complaint —in other words, they have directed the Bankrupt Act in reference to the different things that constitute bankruptcy. We deny all of those and further allege in our answer that that conveyance in the form of a pledge back in December of 1952 was for a fair consideration; that no preference was intended or no preference was made to a creditor at that time.

Now, in January of 1952 and in February of 1952, it became determined by the United Towing Company and the bankrupt C. J. Dick Towing Company it would not

be advantageous for C. J. Dick Towing Company to make a payment back on their pledge of a loan from the United Towing Company; so the two companies got together, they were the same directors and same officers, and were trying to work out for the benefit of both companies and agreed United Towing Company might retain the complete title to that stock which heretofore had been pledged in return for the complete wiping out of this cash loan which was made at the time the pledge of stock was made.

In other words the 88,500 was loaned C. J. Dick Towing Company, the bankrupt, and at the same time the pledge of stock was made to secure that $88,500. So in January of 1953 the two companies got together and C. J. Dick Towing Company still needed operating capital, and it was agreed United Towing Company would retain that stock with Dick's permission for full satisfaction of the debt, and let Dick keep the $82,000 cash instead of redeeming the stock. That is reflected in the Minutes of both companies; but for tax purposes, since C. J. Dick Towing Company's fiscal year was October 31, 1953, and United was the end of the month before—September 30th—actual transfer was postponed to Oct. 31, 1953 to determine whether C. J. Dick Towing Company would have a big capital gain and maybe postpone actual surrender of a redemption right. Dick only had a redemption right at that time so actual transfer was postponed far enough down in the year so Dick could determine its capital gain status.

In other words, if Dick had a big capital gain that year, it would postpone it, and that way there would be a tax saving. They were advised to do that by their attorney and it is perfectly legal.

Our contention is also there was no fraudulent transaction, admitted the directors were the same, the officers were the same, and the stockholders were different. The transactions were handled out of the same building, Your Honor. United Towing Company had its office in the same building as C. J. Dick Towing Company. They had separate bookkeepers. They had separate offices, separate bank accounts, a separate set of books. This transaction, although on a friendly basis, was entered into at arm's length. We contend it was not fraudulent. Everything was on a business basis. When C. J. Dick borrowed its $88,500, it did need operating capital, that it was not insolvent at the time, and received a fair valuation, as will be reflected by appraisals of the property for the stock they pledged and for the stock they later on surrendered the redemption rights October 1, 1953, more than four months before the involuntary petition in bankruptcy was filed.

The burden of proof, I believe, is on the trustee to establish his positions. There were other companies. We admit Mr. Jones had other companies; but the main question boils down to, Your Honor, if I may suggest, to whether there was a fair consideration exchanged for the pledged stock in December of 1952.

The next is whether there was a preference, and I assume it will come out later on a question of whether there was any fraud. If there was a fair consideration, we take the position it would make no difference at that particular time whether the company was insolvent or not. If they secured operating capital for their payrolls and at a fair value back in December of 1952, whether they are insolvent or not, which we deny, it made no difference.

In other words, it was a trade. They swapped something they had for something they needed at a fair consideration.

Your Honor, I don't see, and I believe our evidence will so reflect that we are going to present that way, that there was a fair evaluation given in 1952, that there was no insolvency at the time, no preference, and that the defendants, United Towing Company particularly, are entitled to retain their stock, if not under the actual transfer in October of 1953, then retain it as a pledge, and are entitled to have their loan repaid them. We think we are entitled to both, but if they are not under the October, 1953, actual redemption right, they are entitled to hold the actual stock, until repaid, and we ask you for that judgment, Your Honor.

* * *

64 Mr. Grundy: Then we have stipulated that prior to the date upon which the capital stock of the Green's Bayou Company was transferred by the C. J. Dick Towing Company to United, that C. J. Dick was the owner of all the capital stock of the Green's Bayou Marine Service Company.

We have stipulated W. T. Peckinpaugh, Jr. appraised the land and improvements, being land owned by Green's Bayou, on behalf of the trustee, and placed a value of $74,000 on the land and $13,951 on the improvements, and Mr. Peckinpaugh if called to testify, would so testify.

In that connection, Mr. Wilson and I have further agreed we will stipulate as to an evaluation similarly made by an appraiser employed by the defendant.

Mr. Wilson: That is Mr. Leslie Appelt, who is employed by the Hugh January Company, and it is stipulated that his appraisal would be $89,492.50 as a gross value on the property involved. I am going to offer it. I didn't identify it as an exhibit because we have some other exhibits; but I will attach it as an exhibit as the case develops.

* * *

67 HOLT P. DANIELS,

one of the defendants herein, called as an adverse witness by plaintiff herein, having been first duly sworn on oath, testified as follows:

67 DIRECT EXAMINATION

Q. (By Mr. Grundy) State your name.

A. Holt P. Daniels, Jr.

Q. You are the same person named as Holt P. Daniels as a party in this lawsuit, are you not?

A. That is correct.

Q. Mr. Daniels, when did you first go to work for the C. J. Dick Towing Company?

A. I was employed by Captain C. J. Dick on January 1, 1948.

Q. How long did you work for the company?

A. I worked for the company continuously from January 1, 1948, until it was adjudicated a bankrupt.

Q. Which was February of 1954, I believe?

A. Right.

Q. What capacity were you employed when you went to work there in 1948,

A. I was employed as office manager for Captain Dick from January 1, 1948, until July of 1949.

Q. Then what capacity did you have in July of 1949?

A. In July of 1949, in conjunction with an agreement between C. J. Dick, an individual, the Second National Bank of Houston, and the C. J. Dick Towing Company, I was installed as secretary and treasurer and member of the Board of Directors of the C. J. Dick Towing Corporation.

Q. You held that office of secretary-treasurer from 1949 until the corporation was placed in bankrupt?

A. That is correct.

Q. What was the business of the C. J. Dick Towing Company?

A. I believe the charter called for the—the charter granted by the State of Texas was for the hauling and carrying of bulk commodities on the inland waterway system of the Mississippi River and its tributaries.

Q. And the Dick Towing Company owned various floating equipment used for that purpose?

A. Yes.

Q. Towboats and barges?

A. Towboats and barges.

Q. At the time you became an officer and director of the C. J. Dick Towing Company, I believe the pleadings also show that you were a stockholder of the C. J. Dick Towing Company.

A. That is correct. I acquired directly from C. J. Dick, an individual, one share of C. J. Dick Towing Company at its par value of $100 a share.

Q. That is your total investment in the capital stock of the C. J. Dick Towing Company?

A. Yes.

Q. Now, Mr. Daniels, there is an allegation that the Dick Company made a transfer of stock of the Green's Bayou Marine Service Company. Would you tell us what you know of Green's Bayou Marine Service Company?

A. Yes, I will be glad to.

In September or October of 1948, Captain Dick acquired the physical plant and properties of the then existing Texas corporation known as the Texas Shipbuilding Corporation, owned by a Mr. Zinnecker, for, I think, the total purchase price of $125,000. His then existing counsel, Fulbright, Crooker, Freeman, Bates & Jaworski, organized a Texas corporation known and called as Green's Bayou Marine Service Company. There were some preliminaries until the corporation matters went to C. J. Dick acting as trustee, but that title moved to the trustee as a wholly-owned subsidiary, and the Dick Towing Company, as a corporation, acquired the total capital stock of the Green's Bayou Marine Service Company, which was $10,000. That is what the subsidiary company was incorporated for, and advanced to Green's Bayou, being a note of $15,000.

The Green's Bayou Marine Service Company then executed a mortgage to the seller of the property, the Texas Shipbuilding Company, a mortgage note in the amount of $100,000, payable monthly.

Q. Was that seller Mr. E. B. Zinnecker?

A. He was the owner of all the stock of the then existing Texas Shipbuilding Company, who sold the physical plant and properties to Captain Dick.

Q. Now, when—strike that, please, ma'am.

Mr. Daniels, I am handing you what has been stipulated as the original Minutes of the annual meeting of

the Directors of the C. J. Dick Towing Company on January 26, 1953. I want to ask you here to look at that first, sir. I believe you have seen it before, haven't you?

A. Yes.

Q. Mr. Daniels, if you will notice those Minutes describe the facts, or they recite the fact that Mr. John D. Jones, who was president of the C. J. Dick Towing Company, advised the Directors that United Towing Company was demanding payment of a certain indebtedness.

Will you tell us, please, what that indebtedness United Towing Company was demanding a payment of consisted of?

A. All right, sir.

Back in December of 1952 those two companies, each had their own marine equipment operating independently, although the same officers and directors of both companies, and United had negotiated for the sale of its tugboat, the Tug Roland, to the Lake Tankers Corporation, a subsidiary of Shell Oil. That sale was to be concluded some time in the early part of December, 1952.

United Towing Company received, in the early part of December, around the 2nd or 3rd of December, as I recall, an advance payment on the sale of that boat in the amount of $10,000, the check made payable to United Towing Company, and at that time Dick Towing Company was badly in need of working capital and we were frankly, at a point where we had all the equipment we had, that we had title to, was encumbered. It had mortgages on it, and we agreed by discussion, called Mr. Casteel, that United was to receive considerable sums of cash money from the sale of this boat and that we were willing to

advance to C. J. Dick Towing Company almost the entire proceeds in excess of $100,000 to C. J. Dick Towing Company, but because of the fact that at that time there was already an existing debt owing by Dick to United, for the sake of other stockholders so we would not breach our fiduciary relationship to them, and so we would have some collateral or security that any loaning institution might require—the only thing that would be of any value to United to hold until those funds might be repaid was the stock in Green's Bayou Marine Service Company; and in December of 1952 and concurrent with the first tender of this 10,000-dollar check I have previously mentioned, we did in essence and in fact take the Green's Bayou stock out of Dick Company's file and place it in United Company's files. It had already been indorsed and was transferable after the indorsement of the stock; and that stayed in United's files until we actually concluded, as evidenced by the books on October 1, 1953, the actual surrender of that stock by United and issuance of new certificates by Green's Bayou to United for the stock in the company.

Q. Let me see if I understand.

On December 1st, 1952, it is your testimony that C. J. Dick was indebted to United Towing Company in some amount?

A. Yes.

Q. And that United Towing Company then advanced further sums to C. J. Dick?

A. Yes.

Q. And C. J. Dick was unable to obtain those funds anywhere else?

A. That is true.

Q. Did C. J. Dick give United a note for those advances?

A. No, we deemed the actual physical transfer of that stock as enough collateral, because we anticipated Dick would be able to repay.

Q. Do you mean United Towing?

A. United anticipated they would be able to receive from Dick because being officers and directors of Dick, we knew and had at that time negotiated sales for some of Dick's equipment, so Dick would be receiving money in the future.

Q. As officers and directors of Dick, you knew in 1952, or had reason to believe, Dick later on would be coming into possession of funds with which it could repay United?

A. That is right.

Q. When United sold the Tug Roland, did it have any other floating equipment left?

A. It had another barge which was leased to Dick. Dick was deriving revenue out of that barge and United charging it a minmum bare boat charter per month.

Q. What was the name of that barge?

A. It was the—I would have to check the records. I think it was NBC 402, if I am not wrong. There are so many barges, and it as been two or three years since I have looked at them, so the actual numbers are rather vague to identify specific pieces of equipment.

Q. In any event, naturally you wouldn't remember the number of the barge at this late date. After United sold the Tug Roland, United then had as its floating equipment one barge?

The Court: You mean that is all it had?

The Witness: Yes, sir, that is all it had left at that time, although we considered as soon as we got the monies back,

United would by no means, nor did they intend to go out of business. The equipment sold was out of date, and new improvements had come in where we felt the best thing to do was sell the old equipment and replace it with newer, to meet competition.

Q. (By Mr. Grundy) Was Dick in competition with United?

A. In effect, so far as they both had the same type operation.

Q. And that, provided either one had the floating equipment necessary to do a particular job, either company would be able to do a customer's job, would it not?

A. Not necessarily. If you don't mind, I like to illustrate that point.

For example, C. J. Dick had a tow of 50,000-barrel capacity which subsequently worked under contract for United States Steel Corporation. It would have been physically impossible for United to have bid on that piece of business because it did not have the equipment.

C. J. Dick also had open-type hopper barges. It moved dry cargoes of manganese ore brought in from Brownsville and up the river for Electro Metallurgical Company. While they were the same type of venture, it did not always mean we—I say "we," could choose which company got the business because the conditions—for example, Mr. Casteel negotiated most of those contracts—and most of those contracts because of the longer operating history of Dick Towing Company, people like DuPont, The Texas Company, Dow Chemical Company, they knew of the Dick operations because they had had previous dealings with Dick and were more inclined to contract with Dick than they were with a comparatively unknown, I might say.

Q. Let me ask you this: was there anything in the charter of either United Towing Company or C. J. Dick Towing Company or in the by-laws or in your holding out of these companies to the public for the purpose of towing business, that would have prevented either company, if they had had the particular type of equipment to do a certain job, from doing a particular job for a company?

A. That was their primary purpose. They were for hire.

Q. You mentioned Mr. Casteel. That was Harland I. Casteel?

A. That is correct.

Q. An attorney in Pittsburgh, Pennsylvania?

A. Yes.

Q. And he was the vice-president of United?

A. Yes.

Mr. Grundy: If the Court please, throughout the course of the case, Mr. Wilson may do the same thing, I may refer to Green's Bayou Marine Service Company as Green's Bayou, and C. J. Dick Towing Company as Dick, and United Towing Company as United.

The Court: During the time you were testifying about did the C. J. Dick Company own the stock of United?

The Witness: No, sir.

Judge, if you will permit me, I will illustrate as to the creation of the companies.

Captain Dick, prior to this agreement in July of 1949, was sole owner of all the stock in C. J. Dick Towing Company, and as well as I recall, because I was not party to it, United Towing Company was created some time

in 1948 by Jones, Casteel, and a Mr. George Bacon, who presently has his own company, the George Bacon Towing Service, here in the Houston area, and has his own equipment; and as I recall further in the creation of United Towing Company, Mr. Bacon contributed this same Tug Roland.

The Court: C. J. Dick and United at that time had different stockholders and the same directors?

The Witness: Only after 1949 did they have the same directors, because the directors of C. J. Dick Towing Company, as I recall, prior to July of 1949 were Captain Dick; Mr. Carl Stearns, a member of Fulbright, Crooker, Freeman, Bates & Jaworski; and I believe, because of the by-laws, it was Mr. Jones.

Mr. Grundy: Your Honor, I would like to clear up one point admitted by the pleadings. That is that at the time of the transfer in question, regardless of what the facts may show of whether it was in December of 1952 or January of 1953 or October 1, 1953, at the time of that transfer that the three named individuals, Jones, Daniels and Casteel, were the officers and directors and stockholders of the C. J. Dick Towing Company. They owned all of the stock and made up all of the Board. They were all of the officers and all of the directors of United and owned substantially the capital stock—

The Court: But not all of it?

Mr. Grundy: Not all of it.

Q. (By Mr. Grundy) Now, getting back to this pledge of December 1st, 1952, I believe you testified a moment

ago there was no note given the C. J. Dick Towing Company from United for that advance.

I wonder if you can tell me—first, how much was the advance?

A. The advance was not in one single amount. In the first advance—in the first intent to advance money it was $10,000 earnest money, at which time or prior to that time before we made that check to Dick; because we knew there would be other considerable monies United would be receiving from the conclusion of the sale of this vessel, we had agreed, and to clarify it, the "we," Mr. Jones, Mr. Casteel, and myself discussed the fact that Dick needed the money.

United would be in a position to loan them the money.

Q. When and where did that discussion take place?

A. December 2nd or 3rd. It was about the 2nd or 3rd. It was the first few days in December, and that we were to receive this 10,000-dollar check from Lake Tankers and that in consideration of tendering first this $10,000 and subsequent monies as soon as United received them from the proceeds of the sale, that Dick would tender and United would receive this stock in Green's Bayou; so after we consulted with Casteel and he agreed that wa the thing to do, I went back in the Dick Towing Company file and got it out of there. we have the one certificate evidencing all the shares in Green's Bayou held by Dick, and brought it in to Mr. Jones, and he indorsed the check payable to United and it was deposited on the 4th or the 5th in the Dick Towing Company bank.

Q. At that time Dick was desperately in need of cash funds?

A. Dick needed funds.

Q. That day when you and Mr. Jones and Mr. Casteel discussed the giving of this pledge, was Mr. Casteel down here, or did you call him?

A. We called him on the phone in Pittsburgh and advised him of Dick's operating conditions in the needing of operating funds.

Q. When you transferred that certificate, when you got the certificate of Green's Bayou out of the safe of C. J. Dick, where did you take it?

A. I gave it to Mr. Jones. He gave me the check and I took it back to the Dick Company bookkeeper.

Q. Who was that?

A. Mr. R. G. Treadway, and Mr. Jones took the stock and walked back to United Towing Company's office and laid it on the desk of the United Towing Company bookkeeper, Mr. Hughes, who later on that same day or the following day came and asked me what should he do with the certificate of stock; at which time I told him to place it in the United Towing Company Minute Book.

Q. When Mr. Hughes came to ask that question, you answered in your capacity as secretary and treasurer of United?

A. Correct.

Q. But when you got it out of the safe of C. J. Dick you got it as secretary and treasurer of Dick?

A. Yes.

Q. Where were those offices of Dick?

A. 1310 McKinney Avenue, downtown Houston.

Q. Will you tell us about the physical lay-out, how they were separated?

A. Yes. On the ground floor.

First there was the switchboard and there was a long corridor, and on one side were some insurance company offices. Mr. Jones had an office. I had an office.

On the left-hand side in back of the building was a large room that contained the file cabinets, books and records, and two desks, at which the bookkeeper and our secretary sat.

On the right-hand side, separated by still another room, was another large office in which United Towing Company records and books and their bookkeeper's desk was located.

Q. Mr. Daniels, as secretary of the C. J. Dick Towing Company, did you prepare any Minutes of the meeting authorizing the borrowing of the advances and the delivery of the certificate of stock as a pledge?

A. No, I did not, because those powers had always been broad in the by-laws of the Dick Towing Company. The first question was raised when we became officers in July of 1949—

Q. Excuse my interrupting.

I don't mean to cut you off, but I am sure you will have an opportunity through your counsel to go over those matters.

You did, however, in the meeting of January 26, 1953, when the decision was made to give the stock to United or transfer the stock to United in satisfaction of the debt, you did prepare Minutes of that transaction?

A. That is true.

Q. All right, sir. Now, at that meeting of January 26, 1953, as described in those minutes, you will notice in the last paragraph, John D. Jones, president of the company, stated to the meeting the company was indebted

to United Towing Company, and so forth, for $105,000. The president further stated that United Towing Company, in consideration of the substantial recent cash advance to C. J. Dick, has demanded an appropriate guarantee of payment be made.

Who demanded that this be made?

A. First of all, the stockholders had questioned us because they knew—the stockholders of United had questioned us, as officers and directors of United, what happened to the cash proceeds from the sale of its lone and surviving tugboat.

They knew the sale price was between a hundred and ten and a hundred and fifteen thousand dollars, and they were looking for definite payment or some cash disbursement; and we went into the fact that United Towing Company had made cash advances in the month of December in the amount of $88,500 to Dick Towing Company and we had received in exchange for that, not a note, but we held the stock of Green's Bayou Marine Service Company as collateral; and the first question was, "How good is that collateral? What is the value? Does Dick intend on paying the money back?" at which time we discussed it and we did agree that Dick was in the process of selling some of its equipment and we presumed Dick would be able to pay the money back.

Anyway, when we reached January of 1953, as officers and directors of the Dick Towing Company, we knew full well that upon the sale of any equipment of Dick Towing Company, if Dick Towing Company tendered all those cash advances back to United, it would be back in the same operating condition it was in in December, when it obtained the advances.

Q. As a matter of fact, Dick Towing Company did not have the cash to do it in January?

A. Not at times.

Q. My question was, and again I will have to interrupt your answer—my question is with respect to those Minutes, your demanding on behalf of United Towing Company that appropriate guarantee of payment be made.

A. I presume you mean what specific individual.

Q. That is right. You know, Mr. Daniels, a corporation has to account through its officers.

What officer?

A. In effect, all three of us demanding. We were holding a fiduciary relationship to the stockholders in United, and it was more or less in the nature of their language; and after all, I wrote it up, not being a lawyer, and perhaps wasn't as clear as I should have been. It was more likely that the officers of United Towing Company were demanding that we make some specific guarantee, because up to that time there was merely the fact that United was holding the stock and it had anticipated it would receive back the monies.

Q. Mr. Daniels, will you look through these Minutes and tell me if those Minutes say anything about the transfer or pledge or delivery, whatever you want to call it, of the certificate of Green's Bayou stock prior to January of—

A. No, I don't find any specific reference.

Of course, my intention, to qualify the language in the instrument, is the fact that United in consideration of substantial cash advances to Dick had demanded appropriate guarantee of payment be made, and I saw no reason to illustrate in here, because after all, sitting on

both sides of the fence, I knew the transfer had been made.

Q. But your Minutes you prepared for C. J. Dick on January 26 reciting as of that date United had demanded guarantee of payment—

A. Which had already been made.

Q. But the Minutes don't show the guarantee had been made?

A. No, but I am in error in not clarifying the language because I was writing the instrument myself, and knowing what had transpired, I wasn't informing myself or any of the other officers who already had full knowledge of what had transpired.

Q. You went on to say in these Minutes, at the bottom of that Page 1, you recite a settlement offer by United Towing Company to cancel the debt less whatever sum C. J. Dick is able to repay in the interim period. The exception is the exchange of the stock held by C. J. Dick Towing Company?

A. Yes, sir.

Q. If the C. J. Dick Towing Company, acting through you as its secretary-treasurer, had already transferred in December of 1952 the capital stock to United Towing Company, through you, why would you put in the Minutes on January 26, 1953, that the Green's Bayou stock was held by the C. J. Dick Towing Company?

A. Of course, the word "held" in this part is ambiguous. C. J. Dick did in effect own the stock. While it didn't hold it insofar as the physical possession — I am not speaking of it as holding it in your hand or keeping it in your files — the implication of the language was to the effect that C. J. Dick was the owner of the stock as of that day and were the recorded owners of the stock until October, 1953, at which time it was transferred.

Q. Mr. Daniels, what was the purpose of postponing the transfer until October 1, 1953?

A. In January, before we sat down to have our annual meeting of the Board of Directors, we had previously discussed these conditions we have referred to here. I called our tax consultant and asked him, told him what we intended doing. We were going to go ahead and transfer the stock in January and refer to it in the Minutes and conclude the transaction then.

Q. Who was that consultant?

A. Mr. Pat Timmons.

He informed me, "Before you do that, let's look at Dick's tax picture."

Dick contemplated selling other major pieces of its equipment in this same fiscal year, which it would, because of low depreciated value, have a pretty high capital gain, plus the fact that we anticipated large operating revenues, because Mr. Casteel was negotiating for a large tow, and we had the United States Steel tow, which was of considerable size, and it occupied this large piece of equipment I spoke of; so that in the over-all picture, as Mr. Timmons projected it to me, based on the picture I had given him of our sales and contractual operation, insofar as towing, he said, "There is no reason you can't defer that until a later period."

He didn't mention any specific date. He said, "Let's wait until you get down to the end of your fiscal year," which ended October 31, "and determine your tax picture, and if it is going to be large and you will have exhausted your carry-forward, by the capital gains method we can defer — it is perfectly agreeable. All the elements of this contract have been concluded, and you can actually con-

clude the physical transfer, which according to the Internal Revenue Code which actually is the point at which the taxable exchange occurs, which is the point of exchange such as we went through on October 1st.

Based on that fact, I talked to these gentlemen in the meeting, and Mr. Casteel said, "I think we should be more specific and put some date."

We chose October 1 because, first of all, it was the first day in the new fiscal year of United. It was the first day of the last month of Dick Towing Company. It was with the understanding that when we reached that period of October 1 and Dick would have a taxable picture, by mutual agreement we would defer the conclusion of that sale until some time in November of 1953, which would put it beyond the period of October 1 or beyond the fiscal year of Dick ending October 31.

Q. You agreed you would defer the actual conclusion until after October 1?

A. If Dick's tax position warranted it; but to be specific and to have some specific language in the Minutes, Mr. Casteel said we should be more specific and state some date, which we reached as October 1, 1953.

Q. The actual transfer was made October 1st, 1953, on the books?

A. Yes.

Q. At this meeting on January 26, the vote is shown on the books as unanimous?

A. Yes.

Q. You and Mr. Jones and Mr. Casteel voted for the transfer and you concluded it would be for the best interests of C. J. Dick Towing Company?

A. Yes, sir.

Q. Was that offer of settlement a cancellation of the debt in exchange for the stock; that offer I believe the pleadings state was accepted by United Towing Company by some action in February of 1953?

A. Yes.

Q. About when was that?

A. In the early part of February, the 5th or 6th.

Q. Was there a meeting of the Board of Directors of United?

A. Yes.

Q. Who attended that meeting?

A. Mr. Jones and myself, and Mr. Casteel had to leave shortly after the 26th and go back to Pittsburgh; but we had our agreement and he went on.

Q. You had a quorum of two out of three?

A. Each of us had knowledge of his acceptance.

Q. And you and Mr. Jones stated acceptance by United Towing?

A. Yes.

Q. I will ask you a couple of questions about the books, Mr. Daniels.

Mr. Daniels, I have here in my hand a small ledger with a black binder which states on the face of it, "C. J. Dick Towing Company General Ledger;" and I will ask you to take this book and look through it and see if you can identify the ledger, sir.

A. It appears to be the general ledger that we had.

Mr. Grundy: I should state, Your Honor, I think in fairness to you, sir, that that book came from the possession of the trustee in bankruptcy; and I will ask you whether or not you turned that over to the trustee at the time the company was adjudicated.

The Witness: Yes.

Q. (By Mr. Grundy) So far as you can tell, does that appear to be the general ledger?

A. Yes, it does.

Q. Do you recognize any of the entries in your writing?

A. Yes. (Indicating.) Here is some of my writing and here is some of the bookkeeper's who left in May or June of 1953.

Q. One other question about this United Towing Company transfer. You mentioned a little while ago there were other stockholders in United Towing and they were asking what happened to the proceeds of the tug Roland. Who are those stockholders?

A. Two gentlemen in Pittsburgh that Mr. Casteel had transferred some of his stock to. I didn't ask how much he sold it for. I never did ask him. He wrote and told me who to transfer the new certificates of stock to.

There were two other gentlemen in Houston.

* * *

100

Q. (By Mr. Grundy) I believe it is stated in the pleadings that the amount payable to United was $82,000.

A. That is correct.

Q. When you made those other entries of October 1, 1953, on the Dick books, did you make an entry to wipe out the account payable of 82-some-odd-thousand dollars to United?

A. Yes,

Q. So you eliminated the account payable of $82,000.

You also eliminated the asset accounts of $10,000 for the note?

A. The investment in the capital stock.

Q. And $15,000 for the note owing from Green's Bayou to C. J. Dick?

A. Yes.

Q. And also 22,000 for the account payable of Green's Bayou from C. J. Dick, and the interest receivable of 2-some-odd-thousand on the note owing from Green's Bayou to Dick?

A. That is correct.

Q. My arithmetic is not very good in my head; but could you tell us approximately what those figures amounted to?

A. I would have to add them up myself.

Q. Let's take these four. Ten thousand dollars for the investment in capital stock.

Fifteen thousand dollars for the note, and then the 22,000-dollar figure for the accounts receivable, and the interest receivable. Is that right, sir?

A. Yes, sir.

Q. What do those four figures add up to?

A. $50,339.20.

Q. All right, sir. So those book entries covering a total of 50,000-some-odd dollars assets were eliminated from the C. J. Dick books and you eliminated the liability of $82,000?

A. Yes.

Q. There must have been another entry on the asset side to make a difference in the 50 and the 82,000.

A. No, the difference would have been book gain or loss, except that for tax purposes, the only tax basis that C. J. Dick Towing Company had in this Green's Bayou Marine Service Company was $10,000, and in determining its taxable gain or loss, it would have been the difference

between the $10,000 and whatever value Dick Towing Company received for the stock; but in this particular case, $82,277 was the liability for gain.

Q. The liability for gaining was $82,000, but in addition to the investment account of $10,000, you also transferred other assets, did you not?

A. That is correct, but bear in mind, if you will that one for tax purposes, now, the 15,000-dollar note nor its accrued interest nor the accounts receivable are taxable bases. They are not invoice costs insofar as the language of Internal Revenue Code goes. I will grant you, they are assets on Dick's books. They are non-collectible assets, because the only way they would ever be collected would be through the process of the sale of the property via the stock that Dick held in the company on the property.

Do you follow me?

Q. Yes, to this extent: Dick had on its books assets in the form of a promissory note on Green's Bayou of $15,000 and an account receivable of 22,000, and that is a total of 37,000, plus two-some-odd thousand, roughly $40,000, owed by Green's Bayou to C. J. Dick.

Dick carried it as an asset account. If the property of Green's Bayou had been sold, assuming sufficient funds had been received, those debts could have been paid?

A. Yes.

Q. I understand there is a difference between tax and factual on the books.

A. That is the only event, if the property sold.

Suppose the property sold for $100,000 cash. First of all, which is still recorded on those books, there are encumbrances against the property that are liabilities of

Green's Bayou; no liabilities of Dick. The mortgage note in the original amount of $100,000 had been reduced, as of this time, to $27,000 plus unpaid taxes in the approximate amount of $3000, so that at the first instance, if and asuming Dick could have sold the property or Green's Bayou through Dick could have sold the property for $100,000, 30,000 would have come off immediately for encumbrances, leaving $70,000.

Dick then would have realized this 50,000.

Q. From the standpoint of physical assets, the accounts receivable and the note were carried on the Dick books as assets and Green's Bayou did have property that might have been sufficient to pay them?

A. Green's Bayou obligations.

Q. So those were transferred to United Towing, along with the capital stock?

A. Correct.

Q. The idea simply was to clean out from Dick all the Green's Bayou entries?

A. All its rights and title to Green's Bayou, her notes, stock, and accounts recivable.

Q. Wouldn't the gain on sale of capital assets be the difference between 50,000 that you have added up and the liability account payable of $82,000?

A. Would you repeat that again slowly?

Q. Yes, I agree it is complicated.

You said, I believe, that the difference — you testified that these four assets, the note, the account, the accrued interest, and the investment in the 10,000-dollar evaluation given to the Green's Bayou stock all added up to $50,000, and those were eliminated from the Dick books; then an

account payable of $82,000 eliminated in the same transaction.

To make those figures balance, some accounting has to be made for the 32,000-dollar difference.

My question was, wouldn't that difference of $32,000 be shown on the ledger as capital gain or gain on the sale of capital assets?

A. Normally.

Q. And it was so shown on your books at that time, wasn't it?

A. I guess it was.

Let me clarify myself to be sure. There it is, right there (indicating).

Q. you are looking at what page?

A. Account 206, styled "Gain or Loss on Sale of Capital Assets."

Q. And there is an entry there of October 1, 1953, in your handwriting?

A. That is correct.

(Thereupon the account page above referred to was marked for identification by the reporter as Plaintiff's Exhibit No. 5.)

Mr. Grundy: We offer as trustee's Exhibit No. 5 the ledger sheet marked Account 206 identified as Plaintiff's Exhibit No. 5 for the purpose of showing there was an entry of October 1, 1953, covering the sale of the Green's Bayou stock.

Q. (By Mr. Grundy) Mr. Daniels, what was the amount of that entry?

A. $31,938.60.

Q. So that was the gain that was shown on the books to make up that difference I was trying to get a moment ago?

A. That is correct.

Q. You mentioned a few moments ago that it would be necessary to refer to another ledger or journal as to that account payable. I have got one here that may answer the problem, and I ask you to examine this and see whether you recognize it, and if you do, whether you can find the entries that you think would be necessary to explain that account.

A. I can only show you the particular entry number in the various accounts that we have enumerated that it affects. The accounts themselves with particular reference to United liability account will be in another ledger similar to the general ledger.

Q. In the interest of time, I am going to say to you during the noon recess I will ask you to spend a few minutes with me and we will see if we can find the right book.

A. All right.

The Court: It is nearly 12:00. The Court will recess until 2:00.

108

AFTERNOON SESSION - NOVEMBER 16, 1955

108 HOLT P. DANIELS,

the witness who was on the stand at the time of the noon recess, resumed the stand at this time and continued his testimony as follows:

108 DIRECT EXAMINATION, CONTINUED

Q. (By Mr. Grundy) Mr. Daniels, I believe at the recess at noon we had just finished discussing this general ledger and we were going to take a look into this group of sheets marked "Voucher Register" to see what entries had been made there in a little more detail, this account payable to United.

A. That is correct.

Q. Would you look in that group of sheets there and find the ones that show the entries of this transaction of October 1st, 1953?

A. Here is the basic ledger, Page 108, styled "Journal Vouchers." Journal Voucher J-9 in which is the summation of the creation of all of those entries that we have spoken about previously to give you the charge against the balance owing United in the amount of $82,277.80.

Q. What was the date of that entry J-9?

A. October 1, 1953.

Q. And that ties in, of course, with the October 1st, 1953, entry in the general ledger?

A. That is right.

Q. Would you state, without the necessity of offering this bulky volume in evidence, would you just state what entry was made by you on October 1, 1953, with reference to this United Towing Company account payable and various asset accounts balanced against them?

A. As I have previously stated, the amount of $82,277.80 was charged against the account payable item to United Towing Company on C. J. Dick Towing Company books.

In other words, it was written off and the corresponding credits would have gone to those enumerated ledgers we have previous discussed; the notes receivable, the accounts

receivable, the investment in the company, and the accrued interest; and the balancing credit would have gone to an account which we have previously designated "Gain or Loss on Sale of Capital Assets."

Q. Can you state whether or not, from that journal entry, those items are the same in amount as the ones you testified to this morning from the general ledger?

A. They are.

Q. All right, sir. Thank you.

Mr. Daniels, did United Towing Company continue in business after January the 26th, 1953?

A. Yes, it did.

Q. For how long?

A. Well, it is still in business.

Q. It has been in business continuously since that date?

A. Yes.

Q. As an officer of United Towing Company, do you draw a salary?

A. No.

Q. Did you draw one in January of 1953?

A. No.

Q. What about Mr. Jones?

A. No, and let me clarify. We have drawn nothing out of United in cash dollars. For the period up to December of 1952 we accrued officers' salaries for Mr. Jones, Mr. Casteel, and myself, none of which are yet paid. They are all remaining unpaid as of this date.

Q. What did you do in December of 1952 about officers' salaries, after that time?

A. We quit accruing officers' salaries after December 1, 1952.

Q. All right, sir. Mr. Daniels, how much was the original capitalization of C. J. Dick Towing Company?

A. Two hundred thousand dollars, represented by 2000 shares of 100-dollar-a-share value stock which C. J. Dick as an individual held in total prior to the agreement of July, 1949.

In other words, he owned all the stock. He had some qualifying stockholders when they incorporated the company in 1947, one share each.

Q. In July of 1949, what was done with the 2000 shares of capital stock owned by Captain Dick?

A. Those 2000 shares were evidenced by one certificate for 1997 shares, which is $199,700. Mr. Jones, Mr. Casteel, and myself each purchased from Mr. C. J. Dick, the individual, one share each in the amount of $100, or an aggregate total of $300. The certificate in the amount of 1997 shares was indorsed by C. J. Dick as an individual in July of 1949 and pledged as additional collateral to the Second National Bank of Houston on the then existing indebtedness that the corporation owed the bank at the date of this tri-party agreement, so the bank held the stock as collateral until their loan was paid off at some subsequent date.

In connection with this tri-party agreement, Captain Dick was to receive from the corporation $X a month and I have to use the word "X" because I really have not seen that agreement in four or five years; but there was a stipulated amount of money he was to receive each month from the corporation, which was in effect to buy back that stock he owned, and it was limited each month by the bank.

In other words, that was part of the consideration of the agreement, the bank continuing its loan to the corporation as of July, 1949, the fact that Captain Dick in-

dorsed his stock, turned it over to the bank to hold as additional collateral, and he was to receive eventually all of his $199,700 out of monies from the corporation, not us individually; the net effect being the corporation was buying back its stock from the then existing stockholders, but we still, effective July, 1949, purchased one share, I believe, and that is all the stock that we ever owned, was one share, I believe; however, after the bank was paid off, I think in April, 1951, and they released this collateral, that stock went back to the files of C. J. Dick Towing Company and remained there.

It was the corporation stock, treasury stock, I would prefer to call it, since they were obligated under the agreement to buy the stock. It was corporation stock and not ours.

Q. The 1997 of the original 2000 shares was retired to the treasury in about some time in 1951?

A. Yes, sir. Of course, the obligation was still running for the unpaid portion right on up to the date of the bankruptcy.

Q. Did either you or Mr. Casteel or Mr. Jones ever increase your investment over and above the original $100 I believe you had put into the capital stock?

A. No, sir.

Q. So the outstanding capital stock of C. J. Dick Towing Company from 1951 up until the present date is still $300?

A. Yes, sir, that is correct.

Q. Now, was Mr. Casteel employed by C. J. Dick Towing Company in a professional capacity?

A. Yes, sir, he was, effective in 1951. Prior to that time — let me go back further.

At the creation of the company, or prior to the creation of the corporation, Captain Dick used Mr. Casteel's services through his connection with the various oil and chemical companies to secure contracts for the continued operation of the company, and Mr. Dick set up a commission fee basis with Mr. Casteel which continued up to July of 1949, at which time we entered into this aforementioned tri-party agreement, and as of July, 1949, Mr. Casteel no longer earned any accrued commissions and his balance — I don't know what it was, but considerably in excess of $10,000 Captain Dick had not paid him.

The intent was to pay him, but nevertheless he had neglected to pay him; and then, in accordance with this agreement with the bank, Mr. Jones was to receive no salary so long as the obligation to the bank existed.

Mr. Castell was to receive no salary, and I was to receive, since it was my only source of income, a salary of $400 a month, which continued up to March or April of 1951 that we paid off this original indebtedness specifically referred to in the agreement of 1949; and effective that day, Mr. Casteel went on a retainer basis and it was accrued monthly.

Q. How much was that?

A. One thousand dollars a month.

Q. One thousand dollars a month?

A. Yes.

Q. How long did that retainer continue to be effective?

A. That retainer was accrued on the books up until — and I would have to check this, Mr. Grundy — I believe the early part of 1953, for about a year and a half.

Q. Did Mr. Casteel advise you and Mr. Jones when various law questions arose in the management of C. J. Dick Towing business, when they came up?

A. He was instrumental in the productivity of the business, in securing contractual operations, representing the towing contract because of his business in Pittsburgh with various oil companies, Texas Company, Gulf, United States Steel, DuPont, Dow; that part of the business which also constituted the great bulk of our business was directly a responsibility or an aftermath of Mr. Casteel's activities. I will put it that way.

In other words, without his activities, I doubt seriously whether we would have gotten the type of business the company needed to sustain the operation.

Q. Mr. Casteel had contacts in Pittsburg enabling him to get contracts for the company?

A. Which he negotiated.

Q. He was not paid a commission for that after 1951, but was paid a monthly retainer?

A. He accrued a monthly retainer. I question whether he got very much of it. The books will reflect the accrual to his credit.

Q. You have spoken several times of indebtedness to the Second National Bank of Houston. The C. J. Dick Towing Company borrowed money continuously from the Second National Bank, did it not, after you came into the picture in 1949?

A. Yes, sir.

Q. Was there any time between, say, January 1 of 1952, the beginning of the calendar year 1952, and the date of bankruptcy in 1954, was there any time at which the C. J. Dick Towing Company did not owe the Second National Bank some money?

A. No.

Q. To make my question more clear, either the indebtedness was a renewal of existing indebtedness or consisted of new borrowings?

A. Yes, that is correct. That was the net effect of it. Of course, an outstanding indebtedness as of a given period would be paid off and a new obligation would be created; so at any given time, any random month, the company was indebted to the bank on its notes payable.

Q. The towing company borrowed money from the bank during the year 1953 secured by the assignment of accounts receivable, didn't it?

A. That is correct.

Q. Will you state what was the practice in connection with making an accounts receivable loan from the Second National Bank?

A. We furnished the bank with a copy of our invoice to the debtor, whoever it might be. We did that together with their forms, which they furnished us, their printed forms, I presume under whatever law governs the lending of the money. They are printed forms. That, together with a short form note which we prepared, and we received 80% of the proceeds of the amount stated on the invoice.

Q. And when the invoice was paid, it was the practice to pay those proceeds to the bank in satisfaction of the borrowing?

A. We deposited the net proceeds of the invoice and that same day, in conjunction with the deposit, tendered the Second National Bank a check in payment of the note. They charged the account with the interest earned.

Q. During that period of time, and especially in 1952 and 1953, did the bank require the C. J. Dick Towing

Company to furnish it with statements of its financial condition?

A. Yes, we furnished the bank statements, as well as I can recall, once a year. That was for the whole period 1949 through 1952.

Q. Mr. Daniels, I have here a two-page instrument captioned "The C. J. Dick Towing Company," titled "Income and Earned Surplus, 1952." This instrument is a carbon copy and unsigned.

I ask you to look at it and tell me whether you have seen that copy or its original before.

A. Well, of course, it has Dick Towing Company name on the top of it. I would presume it was our financial statement.

Q. Did you prepare that?

A. No, at the time I did not prepare the financial statement. The bookkeeper prepared them. Of course, they were under my supervision. I was responsible because of my relationship with the company, but I didn't actually prepare the statements. I didn't sit down and go through the mechanical process. I would presume it is our statement. I don't recall the history of the thing, that I furnished a number of financial statements, or the company did, which was one of my delegated authorities to do, to follow up credit reports, and I talked to Dun and Bradstreet and various creditors, and we furnished them with reports that would be prepared by our office staff.

Q. When the statements were prepared, did you customarily take them to the officer of the bank you had been dealing with?

A. Either take them or mail them.

Q. Who was that?

A. Mr. Seydler.

Q. Mr. H. M. Seydler?

A. Yes.

Q. The Dick Towing Company dealt primarily with Mr. Seydler?

A. Necessarily, all of our transactions were consummated with Mr. Seydler.

Q. All right, sir.

Now, Mr. Daniels, you remember when we were taking Mr. Seydler's deposition in his office about last Tuesday evening and you were present?

A. Yes, sir.

Q. I am going to show you what was attached to that deposition, identified by Mr. Seydler, this instrument marked Plaintiff's Exhibit 12, which appears to be a promissory note of the Dick Towing Company; and I ask you whether or not that is your signature.

A. Yes.

Q. I might say to you, Counsel agreed at the time of taking the deposition that a photostatic copy of the instruments could be attached to the original deposition without calling for the originals by reason of convenience to the bank.

I am sorry, sir. Did you say that is your signature on that note?

A. Yes, that is.

Q. Turning here to this legal-sized instrument, which appears to be a printed form marked Plaintiff's Exhibit No. 13, that also bears a signature on it.

Is that your signature?

A. Yes, sir, that is my signature.

Q. All right, sir. Would you look at this note and this assignment of account and state whether or not the Dick

Towing Company did receive from the Second National Bank the sum of $14,480, represented by that note?

A. I am sure they must have, Mr. Grundy, because I see that note was subsequently paid; so if we paid the money back to them, we must have gotten it. That would be my only answer to it. I admit it is a roundabout way, but I am presuming we did get the money.

Q. All right, sir.

Mr. Grundy: We offer in evidence on behalf of the trustee as Plaintiff's Exhibit No. 6 the promissory note dated September 14th, 1953, payable to the order of the Second National Bank of Houston, which has been marked "PX12," and is attached in sequence to the original deposition of H. M. Seydler; and at the same time we offer as trustee's or Plaintiff's Exhibit No. 7 the printed form assignment of an account receivable, marked "PX13," attached to the deposition of H. M. Seydler, both of which have been identified by this witness as being his signature.

(Thereupon the promissory note above referred to was marked for identification by the reporter as Plaintiff's Exhibit No. 6; and the assignment form of account receivable was marked for identification by the reporter as Plaintiff's Exhibit No. 7.)

Mr. Wilson: To that I want to offer this objection, that it is immaterial and irrelevant to any issue in this case, based upon the fact that the question before the Court now is a preferential transfer; and a note showing it is paid or an assignment or agreement in September of 1953 would have no reflection on whether Dick Towing

Company was insolvent in December of 1952, January of 1953, or February of 1953 or October of 1953; therefore it would be irrelevant and immaterial to the particular issue in question in this case.

Mr. Grundy: If the Court please, the instruments are offered for the purpose of connecting them up and establishing by the testimony of Mr. Seydler on deposition and by the testimony of another witness that the money was borrowed, that the account so assigned did not exist.

The testimony we will offer to prove by these witnesses is that the account receivable described in that transaction did not exist and at no time existed; that it was a false invoice. For that purpose, the testimony is offered; not for the purpose of shedding any light on solvency or insolvency of the Dick Towing Company, but as being highly material on the question of actual intent of the defendant corporations and the officers of the bankrupt corporation, who are individual defendants, to hinder, delay, or defraud the creditors; and if the Court cares to hear argument on the point, if I may have a moment, I believe I might produce authorities in support of this proposition.

Mr. Wilson: May I answer that?

The Court: Yes.

Mr. Wilson: The note itself, Your Honor, is remote in both point of time and point in this case. Regardless of what Dick's character of operations may have been in the latter part of the year, it would have no bearing on whether there was a preferential transfer by C. J. Dick to United Towing Company. It has no connection with

United, and the question is whether United received a preferential payment of a debt.

This note has nothing to do with United; neither does the assignment; therefore, we contend it is immaterial to any point in this case. What Dick did after this date or later on, so long as it does not involve United, has no position in this case. That is our position.

The Court: My feeling is that the matter is admissible in evidence, but I haven't gotten far enough into the case to be absolutely certain; so I am going to let it come in and be admitted; but if later on you want to raise the question again, I will be glad to hear you.

Mr. Wilson: May we have our exception, Your Honor?

The Court: Yes, or if I decide myself it is not admissible, I may exclude it.

You seem to have quite a lawsuit here involving many transactions, and while you gentlemen are fairly abreast of it, I just started into it this morning. That is why I am reserving the ruling now.

Mr. Wilson: I can appreciate that, Your Honor.

Q. (By Mr. Grundy) Mr. Daniels, would you look at this instrument and tell me whether or not you have ever seen that instrument before?

A. Well, it is one of Dick Towing Company invoices, No. 575, dated September 14, 1953. It appears to be written like our other invoices.

Q. Who made up the Dick Towing Company invoices, Mr. Daniels?

A. I did after our bookkeeper left in May or June of 1953.

Q. May or June of 1953?

Can you state whether or not you made up that invoice?

A. I must have made it up, if that is our invoice, based on information given me in conjunction with the preparation of those notes.

In other words, that was my mechanical job, to keep books, make up invoices, do the regular work, take deposits to the bank, and note transactions; so any time after May or June, 1953, any of those things were prepared, I am sure I must have prepared them, because I was the only one there.

Q. With respect to that particular transaction and invoice to the Port Arthur Towing Company, do you recall that transaction?

A. No, sir, other than I made it up, made the note, took it over to the bank, borrowed money on it. As I said, it is a quite regular invoice which we had quite a number of.

Q. Now, do you know whether or not you sent a copy of that invoice to the Port Arthur Towing Company?

A. That was part of the procedure of the bank accepting the loans, that we mail the original and two copies, placed them in an envelope with the consignor or to whomever the freight bill was made payable to, in an envelope stamped and addressed, and the bank mailed the envelopes themselves. It was just a procedure that had been existing over a long period of time.

As a matter of fact, I think they had always been doing that when I came with the company.

Q. All right, sir.

(Thereupon a certain document was marked by the reporter for identification only as Plaintiff's Exhibit No. 8.)

Q. (By Mr. Grundy) I believe the note introduced in Mr. Seydler's deposition for $14,480 had a "Paid" stamp on it; is that correct?

A. Yes, sir.

Q. What was the date of that "Paid" stamp?

A. November 21, 1953.

Q. Mr. Daniels, did the C. J. Dick Towing Company actually perform the work for the Port Arthur Towing Company actually covered by that note and assignment transaction?

A. Subsequently it was proven that they did not. The date that note was made up, I had no reason to believe that it wasn't complete and regular on its face.

The Court: Would you please read that question and answer back?

The Official Reporter (Reading): "Q. Mr. Daniels, did the C. J. Dick Towing Company actually perform the work for the Port Arthur Towing Company actually covered by that note and assignment transaction?

"A. Subsequently it was proven that they did not. The date that note was made up, I had no reason to believe that it wasn't complete and regular on its face."

The Court: Go ahead.

The Witness: And apparently what had happened, and since my capacity as secretary and treasurer of the company was not to negotiate for those contracts, I had no way of knowing what the circumstances were until after they had transpired.

In other words, I was not on top of it. It came to me in a matter of course that for some reason which I cannot explain, because not being a first party to the transaction I wasn't familiar whether it was weather conditions — sometime those things happen, delaying tows, and a contract is canceled. We had that happen many times. What the exact reasons were surrounding that, I cannot say, because I really don't know.

Q. (By Mr. Grundy) In any event, however, you do know in your official capacity that the C. J. Dick Company did not perform the towing services for the Port Arthur Company by that note and assignment?

A. That is right.

Q. And later on the C. J. Dick Towing Company in November had to pay to the Second National Bank the amount of that note, and did so pay it?

A. Yes, that is correct.

Mr. Grundy: Your Honor, at this point we do have our witness coming over here. He is due to be back at 3:00 from Port Arthur. I am going to try to keep the chronology of this, because it is involved, but I would like permission when he does come in to put him on and tie him in with this particular transaction so we might release him.

The Court: Any objections?

Mr. Wilson: Your Honor, I kind of hate to agree to that. I don't know what may develop later in the case. We may want to ask some questions. There has been injected something about the Port Arthur Towing Company, and what will develop later, I don't know.

I would object to the witness being released.

The Court: The only question I have now is not the matter of releasing the Port Arthur witness after he testifies. The question I have is whether this witness may be put on, this witness put aside and the Port Arthur witness put on the stand.

Mr. Wilson: That is agreeable.

The Court: That is all right.

Mr. Grundy: That is what I wanted.

The Court: When he arrives, you had better call my attention to it.

Mr. Grundy: I have learned the witness is available. He is out in the corridor, and I believe it will aid the development of this case to let this witness stand aside and call the captain.

The Court: I am going to adjourn promptly at 4:00. I guess you will get through with him by then?

Mr. Grundy: Yes, sir.

* * *

HOLT P. DANIELS,

the witness who was formerly on the stand, resumed the stand at this time and continued his testimony as follows:

149 DIRECT EXAMINATION, CONTINUED

Q. (By Mr. Grundy) Mr. Daniels, will you look at this file I am handing you and tell me what it is, please?

A. It is the daily office log of the motor vessel Chili Simpson.

Q. What was the motor vessel Chili Simpson; a towboat?

A. Yes, sir, one of our larger towboats.

The Court: What was the name?

The Witness: The motor vessel Chili Simpson.

Q. (By Mr. Grundy) Mr. Daniels, would you look through these daily logs and see if you can find the log for the Chili Simpson covering the date of September 11, 1953.

Have you found it, sir?

A. Yes, I have.

Q. Mr. Daniels, this is a printed form, is it not?

A. Yes, sir.

Q. Will you state whether or not the daily office log of those vessels of the C. J. Dick Towing Company came to you as an officer of the company?

A. They came to the office. They were not under my jurisdiction. They were mailed as the captain mailed them from his ship, wherever they might be. He may have

accumulated 30 or 40 days of those logs and mailed them in at infrequent periods of time.

The Court: Does this vessel belong to your company?

The Witness: Yes, sir.

Q. (By Mr. Grundy) Now, Mr. Daniels, who was the captain of the Chili Simpson?

A. Archie Berwick.

Q. Do you know Captain Berwick?

A. Yes.

Q. Is that his signature?

A. Yes, I believe it is.

(Thereupon a certain document was marked for identification by the reporter as Plaintiff's Exhibit No. 9.)

Mr. Grundy: We offer this as Plaintiff's Exhibit No. 9 for the purpose of showing, as the note and assignment of accounts receivable and the invoice to the Port Arthur Towing Company were offered, we offer this for the purpose of showing that the invoice in question was not a true invoice and that the work was not done.

I may state the materiality of it is that it is a daily log showing the position of the vessel Chili Simpson, which was described in the invoice on which the money was borrowed as being the vessel doing the towing in question, and the purport of that log is to show the vessel Chili Simpson on the date of the invoice was nowhere near the place of that shipment.

Mr. Wilson: I will object to it. I believe it has been stated that the invoice represented the tow was not performed, and it is submitted it was not performed; and to show anything else to bolster what we are willing to admit — why it wasn't performed, that might be another question, but we admit it was not performed, and to show one of their tugs was out of pocket, I don't think has any materiality.

The Court: I will let it in, if you admit it was not performed, for that purpose only.

Mr. Grundy: We want to show by this instrument the motor vessel named in the invoice was not at the place described in the invoice, and the purpose of the invoice was to show that the work was not performed.

Mr. Wilson: There are other tugs. We admit it was not performed anyway, whether the Chili Simpson was there or the Casteel or any other — we admit it was not performed.

The Court: I will let it in.

Mr. Wilson: Note our exception.

The Court: Along with your admission, I think he could pretty well prove it.

Mr. Wilson: I think so.

Q. (By Mr. Grundy) Now, Mr. Daniels, you are acquainted with Mr. Jack Neilson, of Louisiana?

A. Yes.

Q. And you know Mr. Neilson operated, in 1953, two

corporations known as the Jack Neilson, Incorporated, and Neilson Barge Lines?

A. Plus one other.

Q. What was the other?

A. W & M Tugboats, Incorporated, I believe.

Q. Mr. Daniels, I want you to look at this instrument marked "PX6," identified by Mr. Seydler the other night as a promissory note of the Dick Towing Company, dated November the 5th, 1953, in the amount of $5788. Is that your signature?

A. That is my signature.

Q. Mr. Daniels, I ask you now to look at the instrument marked "PX7," which purports to be a legal-sized assignment dated November 5th, 1953, and I ask you if that is your signature.

A. That is my signature.

Q. All right, sir; then I ask you to look at the freight bill No. 587, dated November 5th, 1953, and marked "PX8," and ask you if you recognize that instrument.

A. That appears to be one of our regular invoices which I explained were prepared in quadruplicate and the original and two copies being mailed to the debtor by the bank.

Q. I ask you to look at the mimeographed or printed instrument marked "PX9," which was dated November the 5th, 1953, and related to that invoice 587, and ask you if that is your signature.

A. Yes, that is my signature.

(Thereupon the four instruments above referred to were marked for identification by the reporter as Plaintiff's Exhibit Nos. 10, 11, 12, and 13, respectively.)

Mr. Grundy: Those instruments are offered as Plaintiff's Exhibits 10, 11, 12, and 13, being respectively, Exhibit 10 is the original promissory note of the Dick Towing Company to the Second National Bank, dated November 5, 1953, for $5788.

Exhibit No. 11 is the printed form assignment of the accounts receivable of the same date, covering an invoice of Jack Neilson, Incorporated, in the sum of $7235.54.

Exhibit No. 12 is the copy of the freight bill or invoice of the same date to Jack Neilson, Incorporated, in the amount of $7235.54.

And Exhibit 13 is a form prepared by the bank, which I have no adequate description for, which states that the invoice of that date, November 5, 1953, has been assigned to the Second National Bank, being the invoice to Jack Neilson, Incorporated, in the amount of $7235.54; all of these instruments being offered as material on the question of actual intent of the defendants to defraud their creditors.

Mr. Wilson: Your Honor, we want to object to all of these instruments. They are all dated after October 1, 1953, which is the last date that we would be concerned with in this proceeding to determine a preference. October 1, 1953, is the date that the Green's Bayou stock redemption last held by United where the original pledged stock certificate was exchanged for a new certificate. Anything happening after October 1 of 1953 would have no bearing whatsoever on the question of a preference.

Those are offered, I assume, to cast some reflction on the officers of the company. Whether the officers of the company were indicted or sent to the penitentiary, or

whatever happened after that effective date of October 1, 1953, when United exchanged their pledged Green's Bayou stock for a new certificate, would have no bearing on the case. It is remote. It doesn't affect the question of preference, the question of insolvency. It shows no connection with anything dealing with preference, insolvency, fairness, or anything else. It is just an accumulation of material in the record to attempt to cast some bias on some of the action of some of the officers.

Maybe they were trying to borrow money and couldn't, or running short of cash; but the date, Your Honor, is November. It was almost a month or a month and a half after the last transaction that is important on the question of preference or insolvency. It was within November, the 14th — that would be within the four months' period of bankruptcy, and no question of transaction at that time. Any transfer at the time would certainly be preference, but this isn't a transfer. They are invoices that were pledged to the bank and they borrowed money on and would have nothing to do with the insolvency or preference question between the original date in December of 1952, when the stock was pledged by the C. J. Dick Towing Company to the United Towing Company for $88,500 advance, and later in January of 1953, when they agreed to surrender that redemption right, C. J. Dick, in exchange for wiping out all debts they owed United; so those invoice transactions, Your Honor, are far afield from the question of preference, and that is what is before Your Honor.

The Court: As I understand the plaintiff's case, they are here undertaking to recover back property, some stock and a lot of realty, two items of property, on the theory

of a preference, and so on; also on the theory that those documents that were executed in connection with that property was to defraud creditors; and as I understood you a while ago, Counselor, those transactions, those overt acts that you say occurred with respect to the Second National Bank, are admissible to show that they did execute those documents to defraud creditors.

Is that what your position is?

Mr. Grundy: To a certain extent. Let me make myself clear: this transaction, the transaction just testified to by the Port Arthur Towing Company officer, and two other transactions which we will offer, are all offered for the same purpose, and at any time the Court wants us to argue with respect to the cases, I will be glad to; but the purpose of introducing this evidence is considered material not, as Counsel says, on the question of insolvency or the transfer made in January or October, but they are material to show the intent.

What was in the minds of those defendants. Fraudulent intent is a very nebulous thing. It can never be proven by direct evidence short of an admission by the defendant, which the cases show is extremely unlikely; therefore, a trustee in cases of this nature is bound to try to prove his case and to bring in evidence which would shed light on the intent of those defendants or their actions.

We contend in our pleading, and it is spelled out clearly, that the action of United Towing Company and John D. Jones and Holt P. Daniels, as officers of that company, and C. J. Dick, when they transferred the capital stock of this subsidiary to themselves in another guise, they did so with an actual intent in their minds to delay or defraud their creditors.

For that purpose we are offering specific evidence of other transactions which indicate an intent to defraud, namely, the borrowing of large sums of money upon invoices for work which was never done and was not being done at the time the loan was made.

The Court: I am going to make the same ruling I made this morning, and I am not so sure as I was this morning that it is admissible for that purpose; but I am going to let it come in and invite you to renew your objection later.

Mr. Wilson: Note our exception. I do want to add, we must keep in mind any money Dick borrowed from banks or otherwise went into their general operating fund to operate and pay creditors. May the creditor they borrowed from, who became a creditor later — they were not a creditor in the $18,000 they paid back, but in this case maybe they became a creditor. That money went to pay other creditors.

I can't see how that would reflect in any way on the question of intent to defraud creditors. They got money to keep operating and did keep operating. There was no intention to defraud.

The Court: I will consider all of that. It is in for the present, but I am not certain it stays in.

Mr. Wilson: Note our exception.

My objection, as previously made, was that it was remote in point of time and immaterial and irrelevant.

Q. (By Mr. Grundy) Now, Mr. Daniels, I hand you "PX2," attached to Mr. Seydler's deposition, being a copy

of the original promissory note of November 9, 1953, in principal of $12,078.

Would you tell me if that is your signature?

A. That is.

Q. Will you look at the succeeding instrument, being marked "PX3," another assignment of accounts receivable, of the same date.

Is that your signature?

A. That is my signature.

Q. I will ask you to look at the freight bill No. 589, dated November 9, 1953, addressed to Neilson Barge Lines, Incorporated, and bearing the legend "PX4;" and I ask you if you can identify that instrument.

A. That appears to be another one of our invoices, handling it the same as previously outlined.

Q. I ask you to look at another printed form which recites that C. J. Dick assigned that on the same date and the same amount of money.

A. Yes.

Q. And that bears "PX5;" and that is your signature?

A. That is my signature.

(Thereupon the four documents above referred to were marked for identification by the reporter as Plaintiff's Exhibits Nos. 14, 15, 16, and 17, respectively.)

Mr. Grundy: We offer those exhibits as Plaintiff's Exhibits 14, 15, 16, and 17, being a promissory note of November 9 to the Second National Bank by the C. J. Dick Towing Company in the sum of $12,078; an assignment of accounts receivable of the Neilson Barge Lines, Incorporated, same date, the amount of the account being

$15,098.57; the invoice to Neilson Barge Lines in the amount of $15,098.57; and the printed statement that the C. J. Dick Towing Company has assigned that invoice to the Second National Bank to secure the payment of the note.

Those instruments are offered for the identical purpose of the preceding instruments.

The Court: Well, he hasn't testified that they are wrong yet, has he?

Mr. Grundy: No, sir.

Mr. Wilson: How is that, Your Honor?

The Court: I was trying to refresh my memory about whether this witness testified there was anything wrong with those.

Mr. Wilson: We want to make the same objection. They are the same type and those are November 9 and the others are November 14. Same objection.

The Court: Which you are contending they are like the first transaction, are you?

Mr. Grundy: Yes, sir.

We are contending the borrowing of money on admittedly false invoices is material to show intent to defraud the creditors.

The Court: What I am saying is, there is no evidence thus far those are a default?

Mr. Wilson: That is the objection I was going to make. There is no evidence.

The Court: There was in the first case. This witness so testified.

Mr. Wilson: The first invoice, subsequent events proved the tow was not consummated.

The Court: These two, you have got no testimony before the Court thus far it was fraudulent.

Mr. Grundy: I will state to the Court and Counsel, as soon as I am through with this witness, in line with Mr. Wilson's request, I propose to connect them up by the testimony of the officer of the bank and the person to whom those bills were sent.

The Court: All right. I just wanted to refresh my memory.

Q. (By Mr. Grundy) Now, Mr. Daniels, one other transaction, sir.

I show you an instrument marked "PX10," attached to Mr. Seydler's deposition, which is a promissory note of August 31, 1953, in the amount of $5095.

Is that your signature?

A. Yes, sir, that is my signature.

Q. Immediately following that, is this printed form, assignment of accounts receivable, bearing the same date and the same amount of money; and I ask you if that is your signature.

A. Yes.

Q. And that marked "PX11"?

A. Yes.

(Thereupon the two documents above referred to were marked for identification by the reporter as Plaintiff's Exhibit Nos. 18 and 19, respectively.)

Mr. Grundy: Subject to my statement to the Court that I propose to connect those two instruments with the testimony of the person to whom the bill was sent, as I will connect the other instruments, I offer Exhibits 18 and 19, being the promissory note of August 31 and the assignment of accounts receivable to Jack Neilson, Incorporated, for the same purpose.

Mr. Wilson: The same objection as heretofore stated.

The Court: Same ruling.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Mr. Daniels, the transaction represented by the note of November 5, 1953, to the Second National Bank and the assignment of a freight bill to Jack Neilson, Incorporated, of the same date for $7235.54, which you have identified a minute ago; would you state whether or not the C. J. Dick Towing Company at any time performed the work for the Jack Neilson, Incorporated, covered by the freight bill?

A. No, they did not.

Q. Now, with respect to the note and assignment of the invoice of November 9, 1953, to Neilson Barge Lines, Incorporated, the invoice being for $15,098, C. J. Dick Towing Company did not at any time perform that movement for the Neilson Barge Lines, did it?

A. That is correct. The information that I received after the preparation of those invoices were that because of river conditions we were unable to meet the obligation, and Mr. Neilson was going to have the services performed elsewhere. That is the information I received.

Q. Were those two particular notes I have asked you about paid?

A. No.

Q. But the money was advanced to the C. J. Dick Towing Company and used in its business?

A. Yes, sir.

Q. Now, Mr. Daniels, turning to this August 31 transaction, the promissory note for $5095 and assignment of an invoice in the amount of $6369.02 to Jack Neilson Incorporated.

Will you state whether or not C. J. Dick Towing Company performed the work called for by that particular assignment?

A. Let me find the invoice.

Offhand I couldn't tell you. I see the note is marked "Paid."

Q. In order to refresh your recollection, I show you what has been labeled Plaintiff's Exhibit No. 1 in the deposition of Jack Neilson, which appears to be a freight bill of the C. J. Dick Towing Company of August 31, 1953, and ask you to state whether or not you recognize that.

A. I recognize the invoice because it is one of our normal invoices; but I couldn't tell you whether that particular tow was delivered or not. I just can't recall, Mr. Counselor.

Q. Now, Mr. Daniels, would you take a look at the daily office log for the motor vessel Chili Simpson and

see if you can find a log for the date of November 5, 1953?

A. There it is.

Q. And is that Mr. Archie Berwick's signature?

A. Yes, sir.

Q. I have asked you to look at this same file you testified about a minute ago as being the office file of the logs of the movement of the vessel.

A. That is correct.

The Court: Is that another transaction about movement of that vessel, or is that the same one?

Mr. Grundy: This ties in the movement of this vessel to the invoice and loan of November 5,1953 as further evidence of the fact that the vessel did not perform the movement described in the invoice.

(Thereupon a certain document was marked for identification by the reporter as Plaintiff's Exhibit No. 20.)

Mr. Wilson: I want to object to the offering for the same reason as heretofore stated, as immaterial and irrelevant for showing preference, insolvency, or any other issue in this case.

The Court: Same ruling.

Mr. Wilson: Note our exception.

Mr. Grundy: I am not sure the record showed whether I actually offered the instrument, and I will state I am now offering Plaintiff's Exhibit No. 20.

Q. (By Mr. Grundy) Now, Mr. Daniels, would you look in that same file of the office log on the movement of the Chili Simpson and see if you can find the daily office log for the day of November 9, 1953?

A. There are two of them.

Q. You have handed me an instrument bearing that date from that file.

A. Yes, sir.

(Thereupon the instrument above referred to was marked for identification by the reporter as Plaintiff's Exhibit No. 21.)

Q. (By Mr. Grundy) Is that the signature of Mr. Archie Berwick?

A. Yes, it appears to be.

Mr. Grundy: We offer in evidence Plaintiff's Exhibit 21 for the same purpose as Plaintiff's Exhibit No. 20, to show that the vessel described in the invoice of November 9 on which the money was borrowed was not actually engaged in that movement, but was somewhere else at that time.

Mr. Wilson: Same objection.

The Court: Same ruling.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Now, Mr. Daniels, one other question about Mr. Seydler's deposition.

You remember that while we were taking his deposition certain financial statements of the C. J. Dick Towing Company were introduced at that time into the deposition?

A. That is right.

Q. I am going to ask you if you will please look at this instrument, being in two pages, "PX-14," which is described as the financial statement of the C. J. Dick Towing Company as of December 31st, 1952, and ask you if you recognize that instrument.

A. That appears to be one of Dick's statements.

Q. Was that a financial statement given to the bank, as far as you know?

A. Yes, sir, I'm sure it was.

Q. Mr. Daniels, you kept — I beg your pardon. Strike that, please, ma'am.

Who did the accounting work for the C. J. Dick Towing Company?

A. Mr. R. G. Treadway.

Q. Who prepared the income tax returns?

A. Mr. Pat Timmons.

Q. I am referring particularly to the years 1951, 1952, and 1953.

A. Mr. Timmons prepared them for 1952 and 1953, and I am not sure whether he prepared it for the fiscal year ending in 1951 or not.

Q. I am handing you what appears to be a taxpayer's copy of the corporation income tax return for the taxable year beginning November 1, 1952, and ending October 31, 1953, and ask you whether or not that is not Mr. Pat F. Timmons' signature on that instrument.

A. Yes, it is.

Q. Would you take a look at that return and state whether or not you recognize that instrument?

A. Yes, sir, it appears to be a copy of the return filed for that fiscal year.

Q. Now, I ask you the same question about this, what appears to be a taxpayer's copy of a corporation income tax return for the fiscal year ending October 31, 1952, which I am handing you, and ask you whether or not that is Mr. Pat F. Timmons' signature.

A. Yes, that appears to be.

Q. And do you recognize that instrument?

A. Yes. It seems to be a copy of the return filed.

(Thereupon the documents above referred to were marked for identification by the reporter as Plaintiff's Exhibits Nos. 22 and 23, respectively.)

Mr. Grundy: We offer in evidence as Plaintiff's Exhibit No. 22 the taxpayer's copy of the income tax return of the C. J. Dick Towing Company for the fiscal year ending October 31, 1952, for the purpose of showing the large loss by the company for that period of time as being material on the question of the company's insolvency at about that time or thereafter; with the statement to the Court that so far as I know, as Counsel for the trustee, the original of this instrument is in the possession of the Director of Internal Revenue, and it is the custom of the office of the Director not to release the original for any purpose, but only to provide photostat copies, even if the person requesting the copy is entitled to it.

Mr. Wilson: I object for this reason: the income tax does not reflect the complete financial condition of the company from this standpoint; that you are entitled to show depreciated assets and take depreciation, which will not give you the complete picture of liability and assets of a company.

The only way that can be shown actually and in effect is an examination of the books and actual value of the property. The income tax returns themselves are not complete to show that.

The Court: Don't you think it goes more to weight than to admissibility?

Mr. Wilson: Your Honor, you may be right there. They will show certain things. They will not show the true picture.

The Court: Objection overruled.

Mr. Wilson: Note our exception.

Mr. Grundy: Plaintiff's Exhibit No. 23 is offered, the taxpayer's copy of the income tax return of the C. J. Dick Towing Company for the taxable year beginning November 1, 1952, and ending October 31, 1953, with the same explanation, that the original is in the custody of the Director of Internal Revenue, and for the same purpose.

Mr. Wilson: I have no objection to the copy. It is just the materiality of the instruments.

The Court: Same objection?

Mr. Wilson: Same objection, Your Honor.

The Court: Same ruling.

It is now 4:00. The Court will adjourn until 9:30 tomorrow morning.

171 MORNING SESSION—NOVEMBER 17, 1955

The Court: Be seated, gentlemen. I hope you gentlemen are feeling pretty good this morning.

Mr. Grundy: Thank you, sir, we are.

The Court: You haven't finished with the witness on the stand, have you?

Mr. Grundy: No, sir, and before we proceed with the interrogation of Mr. Daniels, I want to state to the Court that my attention has been brought to the fact that Captain Freedman, the witness from Port Arthur, has returned this morning and is available; however, since they are sitting in the hall, I wonder if we could make some informal agreement to have him report back toward the end of the day?

Mr. Wilson: I am going to release him. We discussed it last night, and we don't need him any further. As far as I am concerned, we will release him.

Mr. Grundy: If I may have a few minutes to confer with the captain.

The Court: Bring him in and I will release him.

Mr. Grundy: May I be excused for a few moments to talk to the captain?

The Court: Yes, sir.

(Short interval.)

Mr. Grundy: We would like to have the witness released, Your Honor.

The Court: It is agreed to release the captain.

172 HOLT P. DANIELS,

the witness who was on the stand at the time Court adjourned, resumed the stand and continued his testimony as follows:

172 DIRECT EXAMINATION, CONTINUED

Q. (By Mr. Grundy) Mr. Daniels, yesterday we were discussing the purchase of the capital stock of the C. J. Dick Towing Company from Captain Dick, and you stated that the company has given Captain Dick, I believe a note, or some obligation to pay him the $200,000 for his stock.

A. That is correct.

The Court: That is stock in the C. J. Dick Towing Company?

The Witness: Yes, sir. The corporation gave a note to Captain C. J. Dick individual, for all of his 1997 shares of stock.

Q. (By Mr. Grundy) And the corporation paid for that stock to Captain Dick?

A. That is correct.

Q. Was Captain Dick paid in full?

A. No, I think I recall he lacked about $2000 of receiving all of his $199,700. It was in the approximate amount of $2000. It may have been $2250. I don't recall.

The Court: The corporation bought its own stock from Captain Dick?

The Witness: Yes, sir, in accordance with this tri-party agreement we entered into back in July of 1949 between the Dick Towing Company, Dick as an individual, and the Second National Bank.

Q. (By Mr. Grundy) Mr. Daniels, I am handing you herewith a manila envelope which bears the typewriting on the outside "General Ledger Sheets, November 1, 1951, through October 31, 1952."

Would you look at those and state whether or not they are the general ledger sheets of the C. J. Dick Towing Company for that period, please?

A. They appear to be, and I presume that they have remained intact since they were placed in here.

In other words, I could not account for each one of the particular accounts, but it appears to be the same general ledgers for that period.

Q. I understand, sir. Without vouching in any way for the fact that all of the sheets are here, which is beyond your knowledege, this does appear to be the ledger sheets for the fiscal year ending October 31, 1952?

A. This is correct.

(Thereupon the documents above referred to were marked for identification by the reporter as Plaintiff's Exhibit No. 24, inclusive.)

Mr. Grundy: I have stated to Counsel that I merely had this witness identify these for future use in the trial of the case. I am not offering it at this time.

Mr. Wilson: And I am reserving objections until later. I make no objection to it at this time.

Q. (By Mr. Grundy) Mr. Daniels, I hand you check No. 11952 of the C. J. Dick Towing Company, dated October 26, 1953, and ask you if that is your signature.

A. Yes, sir, that is correct.

Q. That is payable to the order of United Towing Company?

A. This is correct.

(Thereupon the document above referred to was marked for identification by the reporter as Plaintiff's Exhibit No. 25.)

Mr. Grundy: We offer this check in evidence as Plaintiff's Exhibit No. 25, as an integral part of the offer of the invoice and the note and the account receivable assigned to the Second National Bank of August 31, 1953, and invoice to Jack Neilson, Incorporated; and the connection being, Your Honor, that the amount of the payment to the bank of that particular invoice was the identical amount of this check. We propose to connect this check with the account of the debtor in that transaction. Either all of that evidence in that transaction will stand or fall together, and it is for that purpose this check is offered.

Mr. Wilson: We make the same objection we have in the past, that it is too remote and immaterial to show a preference in December of 1952 between the United Towing Company — C. J. Dick Towing Company and United Towing Company, or in January of 1953 or February of 1953 or October 1 of 1953. This check is dated October 26, 1953.

The Court: Same ruling.

Mr. Wilson: Note our exception, please.

Q. (By Mr. Grundy) Mr. Daniels, I am going to ask you to identify, if you can, some blue-backed instruments, which are labeled "C. J. Dick Journal Vouchers" for various dates and amounts. I will hand them to you one by one.

Mr. Grundy: I will say to the Court, I don't propose to introduce all of these instruments.

Q. (By Mr. Grundy) The first one bears the date 3/30/53.

The Court: What do you call them?

Mr. Grundy: They are labeled "Journal Vouchers of C. J. Dick Towing Company."

Q. (By Mr. Grundy) Do you recognize that instrument, sir?

A. Yes, I do.

Q. Does it have any identifying mark by which you can recognize it; your initials?

A. Yes, the "T" is the initial of Treadway, the bookkeeper who prepared it, and the "D" is my initial, for Daniels, who examined it at some subsequent date.

Q. What is the amount of that?

A. $36,500, which represents a debit deposit to the Second National Bank of Houston and credit to accounts receivable of John D. Jones, Incorporated.

Q. Please, would you explain what that journal voucher was for, how those were entered in the keeping of the books of the C. J. Dick Towing Company?

A. In 1952 Mr. Casteel, the attorney and vice-president of C. J. Dick Towing Company and United Towing Company, obtained from United States Steel Corporation a

very remunerative piece of business which encompassed simply to supply United States Steel with a given quantity per month of No. 6 fuel oil into their Pennsylvania steel works.

Because of the purchasing policy of the United States Steel Company, they did not and still do not buy oil in their own name because of reciprocity agreements; therefore, they look to someone to purchase the oil and transport it to their steel mills, at which time they would buy it at a given price f.o.b. their steel mill. Of course, Mr. Casteel priced it to C. J. Dick Towing Company and, upon advice from our Counsel, it was ascertained that it would have been impossible for Dick Towing Company to purchase and sell oil, since their charter did not permit that. It only permitted them to transport commodities, to be for hire.

Therefore, in that same period, some time in 1952, I cannot recall the exact date, — I believe it was in the middle of the year — there was a company created called the John D. Jones, Incorporated.

Q. When was that, 1953?

A. 1952 or 1951, I believe it was.

We had the contract for one year from I believe June of 1951 to July of 1952, and it was renewed and increased as to quantity for 1952 to run until July of 1953.

At any rate, that was the history of the creation of John D. Jones, Incorporated; so that it could buy and sell the oil and permit C. J. Dick Towing Company to transport it at a fairly reasonable rate; but John D. Jones Incorporated, had to buy the oil, to add the transportation, and to bill, invoice, United States Steel for one total price laid into their mills in Pittsburgh.

Upon the creation of John D. Jones, Incorporated, Mr. Jones, being president, went to the Second National Bank, where C. J. Dick Towing Company had always done its business, and tendered the contract that Mr. Casteel had formulated between John D. Jones, Incorporated, and the United States Steel Corporation, at which United States Steel was obligated to buy for a period of one year a given quantity of No. 6 fuel oil, delivered to their mill in Pittsburgh.

Mr. Jones was unable to obtain the financing because the purchaser had to place a lien of credit for the acquisition of the oil in the Gulf Coast area. In this particular case, the oil was from the Hayes Terminal on the Ship Channel, and Hayes required Jones to place a lien of credit in excess of $100,000, which was the value of the cargo. Mr. Seydler submitted it to the Board and they were reluctant to extend credit to any corporation of this type in that amount of money.

Thereupon, Mr. Jones communicated with a Mr. Albert Fagan, the owner of the Cooper Petroleum Company here in Houston, who banked with the Second National Bank, and who had, over a period of years, developed a substantial credit rating with the bank. Mr. Fagan agreed to handle the letter of credit through his name because he had established credit, for a commission of, I think, five cents a barrel on the total quantity delivered. That was his fee for handling the letter of credit arrangement.

Dick Towing Company moved and transported the oil. John D. Jones, Incorporated, had the prime contract because it was created to buy and sell oil, which, of course, C. J. Dick Towing Company could not do. Dick Towing

Company leased to John D. Jones, Incorporated, on a bare-boat charter basis, fully manned, fully outfitted, at a given rate per month, which I believe was $35,000. John D. Jones, Incorporated, billed United States Steel and was paid as each tow was delivered, and in turn, paid their obligation to C. J. Dick Towing Company on the bare-boat basis, and that was done primarily because once again United States Steel did not want to pay transportation tax on their commodity.

Q. Excuse my interrupting.

What I wanted to get is the year also for those journal vouchers. If you would explain from the bookkeeping standpoint how those were used in your company.

The Court: Before you go on, you say John Jones collected from the Steel Corporation and then he paid Dick?

The Witness: Yes, sir, $35,000 a month.

The Court: Did John Jones have anything left out of it, or did he pay it all?

The Witness: We got it as close as we possibly could to the gross receipts; and here is, from a factual standpoint, what happened: some months, because of low river conditions in the upper regions of the Ohio, the tow was unable to load the quantity specified in the contract, so that the gross value invoiced to United States Steel would be below $35,000; yet John D. Jones, Incorporated, was obligated because it was chartering on a month-to-month basis the flat given rate of $35,000 a month; so John D. Jones, Incorporated, might go into the hole, being a de-

ficit, which I would have to check up, to pay Dick because Dick earned its tow unless there was negligence on the part of Dick Towing Company; but because of acts of God or reasons beyond the control of either party that they were unable to load a given quantity or the quantity specified in the contract, why, Jones would owe Dick more money than it actually collected; and thusly, in other months, where there were high waters, Dick, in order to fullfill Jones' obligation to Steel for a given quantity over the year, had to go back and pick up extra quantities of cargo to average it out on a year's basis.

The Court: Generally speaking, John D. Jones made no profit on it?

The Witness: No, sir, they made no profit.

The Court: All right; go ahead.

The Witness: Back to your question.

This particular entry represents the payment from John D. Jones, Incorporated, to C. J. Dick Towing Company. In other words, the money is flowing from John D. Jones and distributed in the C. J. Dick Towing Company account on this journal voucher.

Q. (By Mr. Grundy) You used these journal vouchers to reflect a transfer of one sort or another on your books?

A. Yes, sir. For everything other than checks written. Of course, the checks written is on its face itself an account, and it has to be debited to whomever credited and paid to the bank drawn on. The journal voucher credited all other transactions. There may be a charge to some

company for some work we did and credit to the revenue account, and in this case, recording money in the bank and recording credit to some previous charge, in this case to John D. Jones, Incorporated.

Q. Now, you, I believe, stated that item of $36,500 deposit to John D. Jones, Incorporated, on March 30th represented the charter hire of the barge Dick had chartered to John D. Jones?

A. For the two towboats and barges fully manned on the charter agreement to John D. Jones, Incorporated.

(Thereupon a certain document was marked for identification by the reporter as Plaintiff's Exhibit No. 26.)

Q. (By Mr. Grundy) Now, Mr. Daniels, I hand you another journal voucher, bearing the date March 3, 1953, which shows a deposit, John D. Jones, Incorporated, of $37,500.

Do you recognize your initial on that instrument?

A. Yes, sir, I do.

Q. That voucher reflects a deposit was made to the C. J. Dick Towing Company account in the amount of $37,500?

A. That is correct.

Q. What generally was the $37,500? The same thing you testified to about the previous voucher?

A. Insofar as I know, it would be, yes.

(Thereupon a certain document was marked for identification by the reporter as Plaintiff's Exhibit No. 27.)

Q. (By Mr. Grundy) The next one is April 30, 1953. Do you recognize your initial on that, in the amount of $37,000?

A. That is correct.

Q. Is that the same kind of transaction?

A. Not quite. This was a charge to John D. Jones and a credit to the charter hire. This is recording a receivable due from charges from that transaction. One of those was recorded every month.

Q. If John D. Jones paid it every month, you would have to have two journal vouchers for each month?

A. Correct.

Q. The next one is "E8," bearing the date May 6, 1953, in the amount of $35,000.

Is that the same transaction?

A. That is the follow-up of a transaction of this nature in which Jones has paid $35,000 to Dick and deposited in Dick' account and giving Jones credit.

(Thereupon two documents were marked for identification by the reporter as Plaintiff's Exhibits Nos. 28 and 29, respectively.)

Q. (By Mr. Grundy) Who organized John D. Jones Incorporated?

A. Mr. Jones, myself, and Mr. Casteel.

Q. And that was a corporation, of course?

A. Yes.

Q. Do you own all the stock, you three individuals?

A. Yes.

Q. Were you the officers and directors?

A. Yes.

Q. Where did it maintain its office?

A. 1310 McKinney.

Q. Mr. Daniels, please, — strike that, please, ma'am.

Mr. Grundy: The trustee offers Plaintiff's Exhibits 26, 27, 28, and 29, being the journal vouchers identified by this witness and covering those 35 and 36,000-dollar transactions, for the purpose of showing that these defendants comingled the assets of various corporations, including the defendant corporation United Towing Company and the bankrupt corporation, C. J. Dick Towing Company; and in that connection I will state that we will offer other journal vouchers which on their face have no explanation that would connect up with any transaction of this nature.

Mr. Wilson: I object to them on the same ground as previous, that they serve no purpose to any issue in this case. The issues involved being preference of creditors.

The Court: Same ruling. This is all on this whole issue of comingling of funds?

Mr. Grundy: Yes, sir.

The Court: All right.

Q. (By Mr. Grundy) Now, Mr. Daniels, I hand you journal voucher E-17, dated May 13, 1953, in the amount of $5000, and ask you if you recognize your initial on that instrument.

A. Yes.

Q. What was that 5000-dollar deposit for?

A. The best I know, it was an advance from John D. Jones, Incorporated, to Dick for services Dick had not yet rendered.

Q. Would you say it was a loan of money to C. J. Dick Towing Company from John D. Jones, Incorporated?

A. You might term it that.

Q. Well, if you had not rendered the services yet, it would be money borrowed or money you had to repay with services or a sum of money?

A. You might term it that.

Q. All right, sir.

(Thereupon a certain document was marked for identification by the reporter as Plaintiff's Exhibit No. 30.)

Mr. Grundy: Rather than taking each one and having it identified and then offer it for the same purpose and let you register your objection to the same offer, I would have him identify them with such explanation and offer the entire group for the same purpose.

Mr. Wilson: I would have them identified by the reporter and have him explain them and then I will make my objection to save time.

The Court: All right.

Mr. Wilson: Have them all identified at one time and have him just state it, Mr. Grundy, and I won't have to bring up each one.

(Thereupon 29 documents were marked for identification by the reporter as Plaintiff's Exhibits Nos. 31 through 59, inclusive.)

Q. (By Mr. Grundy) Mr. Daniels, this is journal voucher E-45, dated May 29, 1953, showing the total amount of $40,000.

Do you recognize your initial on that instrument?

A. Yes, sir, I do.

Q. Can you tell us what that journal voucher was intended to cover, what transaction?

A. This $40,000 that John D. Jones, Incorporated, tendered to Dick Towing Company was deposited in the Dick Towing Company account. $29,550 was credited for the amount that John D. Jones, Incorporated, owed the Dick Towing Company books, and the other $10,450 was a further advance to Dick Towing Company, apparently.

This is my interpretation of this journal voucher.

Q. All right, sir. The next instrument is journal voucher E-46, bearing the date May 29, 1953, in the amount of $35,000.

Do you recognize your initial on that one?

A. Yes, sir, I do.

Q. What is your explanation of that entry?

A. A charge by C. J. Dick Towing Company to John D. Jones, Incorporated, for the charter of towing equipment for a particular month in the amount of $35,000.

Q. The next instrument is journal voucher F-26, bearing the date of June 16, 1953, in the amount of $7000.

Do you recognize your initials on that?

A. Yes, sir, I do.

Q. And what is that entry?

A. That is a deposit of a check from John D. Jones & Company, which was Mr. Jones' insurance agency that he had owned prior to the time that he came into Dick Towing Company, and this was a deposit in Dick Towing Company bank account of a check from that insurance company in the amount of $7000.

Q. The next instrument is journal voucher F-40, bearing the date 6/30/53. This is in the amount of $35,000.

Do you recognize your initial on that instrument?

A. Yes, I do.

Q. Is that another 35,000-dollar charter hire?

A. It is.

Q. Next we have journal voucher G-12, dated July 6, 1953, in the amount of $2500.

Do you recognize your initials on that?

A. I do.

Q. What is that for?

A. That was a check from John Jones, Incorporated, to C. J. Dick Towing Company, deposited in the Dick Towing Company bank account, in the amount of $2500, and credited to the account for monies that John Jones, Incorporated, owed.

Q. That was a payment on account from John Jones?

A. A payment on account.

Q. Did John Jones, Incorporated, owe C. J. Dck Towing Company money for anything other than this charter hire?

A. No.

Q. So that it would have been the charter hire account?

A. That is correct.

Q. Now, Mr. Daniels, voucher No. G-19, July 20th, 1953, in the amount of $35,000.

Do you recognize your initial on that instrument?

A. I do.

Q. And I believe that is your handwriting?

A. I prepared that myself.

Q. What is the explanation of that entry?

A. That is another 35,000-dollar check flowing from John D. Jones, Incorporated, as a payment on its account

to C. J. Dick Towing Company and deposited by C. J. Dick Towing Company in its bank.

Q. What were the names of the vessels of your tow?

A. There was the vessel Casteel, named after the vice-president, and the barges D200 and 201, and then in October of 1953 I believe we added a section to that tow, Barge NBC — it was on lease from Charles C. Smith, Incorporated — A28, I believe, but I may stand corrected.

Q. Voucher No. G-9, bearing the date July 14, 1953, in the amount of $32,500; do you recognize your initials on that instrument?

A. Yes, sir.

Q. What was that voucher for?

A. Monies paid on account by John D. Jones, Incorporated, to the C. J. Dick Towing Company and deposited in the Dick Towing Company account.

Q. Now, there is next a check dated July 30, 1953, in the amount of $5000 of C. J. Dick Towing Company, payable to the order of John D. Jones, Incorporated.

Do you recognize your signature on that instrument?

A. Yes.

Q. What was that 5000-dollar check for?

A. Offhand, Mr. Grundy, I couldn't tell you. I just wouldn't know what it is for, just looking at the check without some voucher reference to see how it was treated or the nature of the transaction. It may have been a payment back to John Jones for advance payments John Jones, Incorporated, had made previously to Dick.

Q. The next instrument is what appears to be a sight voucher bearing the date July 30, 1953, in the amount of $50,000.

Is that your handwriting?

A. That is $5000.

Q. I beg your pardon.

Suppose you tell us what that instrument is.

A. Well, this is merely a copy of those checks, and as I mentioned a while ago, all of Dick's primary transactions were recorded on these blue vouchers, with the single exception of every check written there were numerous copies, the first of which was this check, and then there were check copies.

The back of this was so designed to fold up to be identical in size with those blue vouchers for purposes of filing. This white copy you have handed me is a copy of this check we previously discussed. You see the number bears the same, 11,686.

Q. The voucher and the check bear the same number and the same date?

A. Yes.

Q. Does it have an explanation of the 5000-dollar check to John D. Jones, Incorporated?

A. Yes, sir, it is the payment on account charged to accounts payable of C. J. Dick Towing Company, two copies to John D. Jones, Incorporated.

Q. Would you say that it was a repayment of part of the monies previously advanced by John D. Jones, Incorporated?

A. Apparently it must be.

Q. Now, Mr. Daniels, here is Check 11630, July 15, 1953, in the amount of $8500, payable to John D. Jones, Incorporated.

Do you recognize your signature?

A. I do.

Q. With that instrument, I am going to show you another white voucher which shows the same date and the same number as that check and ask you whether you recognize your initial on the white voucher.

A. I do.

Q. With those two instruments together, can you tell us what the 8500-dollar payment to John D. Jones, Incorporated, was for?

A. It appears to be the same general nature that the previously discussed item — in other words, a repayment of monies advanced to Dick by John Jones, Incorporated.

Q. Mr. Daniels, the next instrument is journal voucher dated July 29, 1953, G-26, in the amount of $50,000.

I will ask you whether or not you recognize your initial on that instrument.

A. I do.

Q. What is that entry for, Mr. Daniels?

A. Well, I am reading the deposit slip. I don't recall where the $50,000 came from, but it was not a transaction between John D. Jones, Incorporated.

Q. I ask you to speak up so the lady can hear you.

A. The $50,000 was deposited in the Dick Towing Company account and credited to an account No. 59, and without reference to the charter of accounts, in the last two years having no connection with Dick, I offhand do not know what account No. 59 was on those books.

Q. All right, sir; then at the present time you are not able to give any explanation?

A. No, sir, I can't tell you where the money came from, other than it was deposited in a C. J. Dick Towing Company account.

Q. There is a duplicate deposit slip for that sum attached to the voucher?

A. Yes, sir. Return of funds from Washington, D. C. which was transferred then by wire on June 17th, 1953 for payment to H. I. Casteel by order of Cooper Petroleum Company.

Apparently Cooper Petroleum had sent $50,000 to Washington and charged C. J. Dick Towing Company. I am surmising from the tail end of the transaction what may have happened. I offhand do not recall, but the fact that the $50,000 was returned and credited to this Account 59 that I have spoken of a moment ago, which I do not recall the nature of Account 59 — if we had a charter of accounts to refer to, which are somewhere in Dick's files, perhaps we could fit it in definitely.

You said June 31st?

Q. June 30, 1953, in the amount of $35,000. That is your handwriting?

A. Yes, sir.

Q. What was that, another 35,000-dollar charter hire item?

A. Yes.

Q. A charge, or a credit?

A. A charge by Dick to John D. Jones, Incorporated.

Q. The next instrument is Voucher H-2, August 3, 1953 in the amount of $39,000.

Do you recognize your handwriting on that?

A. Yes, sir, I do.

Q. What is that item for?

A. That is for charter hire, and I think this is about the time, as I referred to a moment ago, some time in the latter part of 1953 we added a center section because United States Steel increased its contractual wants in the number of barrels, so we had to add additional equipment to the tow; thus we increased the charter hire from C. J. Dick Towing Company to John D. Jones, Incorporated.

Q. The next instrument is journal voucher H-27, dated August 25, 1953, in the amount of $35,000.

Do you recognize your handwriting on that?

A. Yes, I do.

Q. What is that one for?

A. That is the deposit of a check in the amount of $27,250 by C. J. Dick Towing Company, said check being received from John D. Jones, Incorporated, and an additional debit of $7750 of an accounts payable that Dick owed to John Jones, so that they earned a portion in cash and wiped out, apparently, whatever portion was left of advance monies Dick had received from John Jones, Incorporated, at a prior date.

Q. On September 1, 1953, journal voucher I-2, in the amount of $39,000; is that your initial?

A. Yes, it is.

Q. Is that another charge for charter hire on this tow?

A. That is correct.

Q. Then on September the 8th, 1953, journal voucher I-5, being in the amount of $3000; is that your initial?

A. Yes.

Q. What is that 3000-dollar deposit from John D. Jones, Incorporated, for?

A. The fact that the credit was to an accounts payable item, it appears to me to be advance monies that John D. Jones, Incorporated, had once again lent C. J. Dick Towing Company.

Q. That represents an advance of $3000 from John D. Jones, Incorporated, to C. J. Dick Towing Company?

A. That is correct.

Q. On September the 11th, 1953, journal voucher I-9, in the amount of $11,600; do you recognize your handwriting on that?

A. I do.

Q. That shows a deposit from John Jones & Company on that date?

A. That is correct; John Jones & Company, rather than John D. Jones, Incorporated.

Q. Was that a loan or advance from John Jones & Company?

A. That was a loan from John Jones Company.

Q. Now, journal voucher I-21, dated September 24, 1953, in the amount of $39,000; is that your handwriting?

A. Yes.

Q. That was another charge for charter hire to John Jones, Incorporated?

A. Yes.

Q. And on September 28th, 1953, journal voucher I-26 in the amount of $1500; is that your handwriting?

A. Yes, sir.

Q. And what was that $1500 for?

A. Additional monies advanced by John D. Jones, Incorporated.

Q. To C. J. Dick Towing Company?

A. To C. J. Dick Towing Company.

Q. Now, this journal voucher J-16, bearing the date October 26, 1953, in the amount of $10,611.44; do you recognize your handwriting on that?

A. Yes, sir.

Q. What did that journal voucher reflect?

A. That reflects another loan by United Towing Company to Dick in the amount of $6369 and the proceeds of an insurance draft for some car collision we had in which our insurance carriers were making refunds of payments we had made to repair the equipment.

Q. Journal voucher J-19, bearing the date October 28,

1953; do you recognize your initial or handwriting on that instrument?

A. Yes, sir, I do.

Q. That is $16,990.90, is it not?

A. That is correct.

Q. What does that reflect the deposits were?

A. $6990.90 from Thomas Petroleum, and $10,000 from John D. Jones, Incorporated.

Q. What entries were made to reflect those two items of $10,000 and $6990?

A. Credit to accounts receivable on Dick's books, which indicates the monies were owing by those two companies and an indebtedness to Dick; not loans, but collections on accounts.

Q. The next item is November the 9th, 1953, journal voucher K-5. Is that your handwriting?

A. Yes, sir, it is.

Q. What is the amount of that voucher?

A. $36,900.15 was deposited in the C. J. Dick Towing Company bank account.

$35,559 of that came from John D. Jones, Incorporated, as a payment on its account to Dick, and $1341.15 is credited to an account 56, which I am at a loss again to explain because of my unfamiliarity with the coding symbols in the past two years. I have forgotten what they stood for. I believe 56 was an asset account, and I believe it was an insurance deposit; but I would not want to be held responsible for that. It is merely a recollection.

Q. I understand.

The next voucher is K-14, November 21, 1953. Is that your handwriting, sir?

A. Yes, sir, it is.

Q. What does that reflect?

A. A deposit in C. J. Dick Towing Company account in the amount of $18,854 from John Jones & Company.

Q. What was that deposit from John Jones & Company for?

A. It is credited to Account 102, which was accounts payable, so that Dick — the contracredit went to accounts payable as monies due and owing to John Jones & Company.

Q. I am not clear. You mean you paid an account?

A. No, no, no. We received the money.

Q. And —

A. The contracredit went to the account of John Jones & Company, acknowledging the liability.

Q. You received on that date of that deposit the $18,854 from John Jones & Company and set up an account payable or increased an account payable to that company by the same amount?

A. That is correct.

Q. Voucher K-19, dated November 28, 1953; is that your handwriting?

A. Yes, sir, it is.

Q. And what does that voucher reflect?

A. It reflects a deposit to the account of C. J. Dick Towing Company in the amount of $5100 and a charge by that bank in the amount of $117.97, representing interest on a note. The $5100 was received from John Jones & Company; thus, as previously mentioned, the liability was recorded to that company.

Q. Mr. Daniels, returning for a minute to Plaintiff's Exhibit 34, which was journal voucher of November 21, 1953, what does the deposit slip of the Second National Bank attached to that voucher reflect those amounts of $18,000 was made up of?

A. It has the bank drawn on. Code symbols 35-69, 1000-

dollar draft, First National Bank, Port Arthur, $17,854, totaling $18,854.

Q. Mr. Daniels, you heard the testimony of Captain Fredeman yesterday about a draft being drawn by the bank on Port Arthur Towing Company?

A. Yes.

Q. Do you think that is the same draft deposited on that date by C. J. Dick Towing Company?

A. It must have been, because it is the only draft I ever remember drawing on the Port Arthur Towing Company.

The Court: Mr. Daniels, you told us when you started this examination about these different things this morning that because C. J. Dick Towing Company was advised by Counsel it could not engage in the purchase of fuel oil, that the John Jones Company was organized?

The Witness: That is correct.

The Court: Those various items you have been identifying for Counsel, are they in connection with the transaction of United States Steel?

The Witness: Yes, sir.

The Court: All of them?

The Witness: Yes, sir.

Mr. Grundy: Well, now, if I may intercede, Your Honor. I believe that the witness identified certain accounts and vouchers with respect to John Jones, Incorporated, which were the charter hire credits and charges as being related to this John D. Jones, Incorporated-United States Steel tow-

boat transaction; but not all of those vouchers, I believe, that we have been talking about this morning were connected with that John D. Jones, Incorporated, towboat transaction, were they, Mr. Daniels?

The Witness: There may have been checks or advance payments by John Jones, but primarily the source of monies came through the United States Steel contract.

That was the point I was trying to make, Your Honor.

The Court: What is in my mind is the large number of those you have been identifying, whether any considerable number of them or all of them were in connection with the operation of the United States Steel contract.

The Witness: Yes, sir, because that was the only relation John D. Jones, Incorporated, had to C. J. Dick Towing Company, was the charter hire. It had the use of Dick Company vessels to fulfill the John D. Jones obligation to United States Steel; otherwise, there would have been no connection between the two entities at all.

The Court: Go ahead.

Q. (By Mr. Grundy) Mr. Daniels, the November 30th, 1953, voucher, K-20, in the amount of $12,312; is that your handwriting?

A. Yes.

Q. What was that for, please?

A. That was a deposit to credit of C. J. Dick Towing Company for monies advanced by John Jones & Company.

Q. That was another advance of money from John Jones & Company?

A. Yes.

Q. That was the insurance company and not the John D. Jones, Incorporated?

A. They had no relationship.

Q. Mr. Daniels, on December 1, 1953, we have journal voucher L-1, and that is in the amount of $20,000.

What was that item?

A. That was a deposit to the account of C. J. Dick Towing Company and credited to the accounts receivable due from John D. Jones Incorporated.

Q. Was that an advance, or in connection with the charter hire of the tow?

A. No, I would not say it was an advance by the very nature of the credit. In other words, it is a credit to an accounts receivable, the creation of which came on another voucher charging John D. Jones and crediting the revenue account of C. J. Dick Towing Company; so I would say that was a payment or a collection of an account.

Q. On December the 14th, 1953, journal voucher L-9, in the amount of $6940.07; is that your handwriting?

A. Yes, it is.

Q. What did that voucher cover?

A. That voucher covers a journal entry made, creating the accounts receivable due from Thomas Petroleum Transit, Incorporated.

Q. And a charge to John D. Jones & Company?

A. And I have styled it an adjustment — proceeds of a check.

Q. What does that mean, Mr. Daniels?

A. Offhand, I don't know. What we were doing, we were reducing the accounts receivable from Thomas Petroleum by $6940.07, and likewise reducing the liability to John Jones & Company for $6940.07. Why, I don't know.

Q. Would that indicate that there was probably at the

same time a transfer of that amount of money from C. J. Dick Towing Company to John Jones & Company?

A. If there was a transfer from Dick to any company, it should be substantiated by one of those white vouchers, which is a check copy on Dick's books. I am at a loss at this time to tell you why that entry was made, but that is the way it is made and recorded.

Q. The last one, L-17, December 23, 1953, in the amount of $16,850; is that your handwriting?

A. Yes, it is.

Q. What is the purpose of that entry?

A. Well, Counsel advised us that there were several contingent lawsuits they were handling for us and that they would deem it advisable to record all possible contingencies on C. J. Dick Towing Company books for lawsuits that might arise out of those lawsuits.

Now, I obtained those amounts from our Counsel and so recorded the liability. The charge, of course, was to earned surplus, because that affected losses, potential losses, that occurred in prior years.

Q. So, on this journal voucher of December 23rd, you set up a contingent liability to Commercial Petroleum & Transport Company of $10,000?

A. Correct.

Q. And Standard Oil of $1850?

A. That is correct.

Q. And to Centennial Insurance Company of $5000?

A. That is correct.

Q. By that, you mean demand was being made or had been made for payment of liabilities by those various companies?

A. No, I didn't mean that. Perhaps I did not make myself clear. Our Counsel, who represented both the C. J.

Dick Towing Company and our underwriters, were in a position to determine from the evidence at hand, I suppose, that there was a possibility of a contingent liability on the part of Dick Towing Company, and I presume over and above the amounts the insurance carriers would be required to pay in those specific amounts, and based on his discussion I recorded that so that it would be recorded on the books, those contingencies. Whether they subsequently arose and were disposed of was a matter beyond my control.

Mr. Grundy: Plaintiff offers in evidence trustee's or Plaintiff Exhibits 30 through 58, being all but the last journal voucher, identified by this witness, for the purpose of tending to prove other various corporations owned by the individual defendants were operated as one, that there was a comingling of assets, and to tend to prove the allegation that the Court, in its equitable jurisdiction, would be entitled to look beyond the corporate entities to ascertain the true facts of the relationship.

Mr. Wilson: I make my same objection as previously made; that it is immaterial and irrelevant to the issues in this case on the question of preference.

The Court: The same ruling.

I think this would be a good time to take our morning recess. Take a recess for ten minutes.

(Short recess.)

The Court: Be seated.
Proceed.

Mr. Grundy: Your Honor, I had had the reporter mark Plaintiff's Exhibit 59, being the last journal voucher identi-

fied and described by this witness. His explanation indicates it would not be material to the issues, and for that reason I do not offer it.

I would like to ask the reporter to strike her identification mark so it will not be confused.

The Court: Any objection?

Mr. Wilson: No.

The Court: It will be done.

(Reporter, complying with Counsel's request, struck the identification mark "Plaintiff's Exhibit No. 59" from the aforemarked document.)

Q. (By Mr. Grundy) Now, Mr. Daniels, handing you a four-page instrument, the first page of which is apparently a printed form of the Treasury Department, labeled "Statement of Financial Condition;" I ask you whether or not that is your signature on the last page of that instrument.

A. Yes, sir, it is.

Q. Will you look through it and see if you recognize it, please?

A. Yes, I recognize it.

(Thereupon the instrument above referred to was marked for identification by the reporter as Plaintiff's Exhibit No. 59.)

Mr. Grundy: We offer in evidence Plaintiff's Exhibit No. 59, being a statement of financial condition of the C. J. Dick Towing Company as of July 31, 1952 as tend-

ing to prove insolvency of the C. J. Dick Towing Company at or about that date, which is material to the—both plaintiff's allegation that the transfer took place some time between January 1, 1952, and October 1, 1953, and defendants' defense, I believe, that the actual pledge of the stock may have taken place on December 1, 1952.

Mr. Wilson: Your Honor, a final statement of July 1, 1952, would be a correct criteria of the statement of the company. It would be, maybe, as of that date, but not later on. I think it is remote in point of time, and we object to it as immaterial and irrelevant.

The Court: I think the objection is more to the weight than to the admissibility.

Mr. Wilson: Note our exception.

The Court: I have to decide how much weight to give to it, if any.

Mr. Wilson: I understand, Your Honor.

Q. (By Mr. Grundy) Mr. Daniels, would you just read from the third page of that statement of income and state what that statement recites is the total net income of the C. J. Dick Towing Company for the period from November 1, 1951, through July 31, 1952?

A. Yes, it shows a red figure of —

Q. Speak up.

A It shows a red figure of $378,893.83.

Q. That red figure is used to indicate, is it not, that the C. J. Dick Towing Company had lost, up until July 31 of that fiscal year, 1952 the $378,000-dollar figure?

A. That is what it purports to be; however, you must examine the nature — the creation of numerous charges to expense, which would, for tax purposes, reflect a loss.

In other words, what occasioned the loss, and we had those two large river boats —

Q. My question was — I don't mean to cut you off, but I am sure you will have ample opportunity to explain if you wish.

My question is what the red figure on the statement indicated, whether on this statement a loss.

Mr. Wilson: I would like to have the rest of his answer. He was going to explain why it indicated a loss.

Mr. Grundy: We have no objection.

The Court: He may explain that.

Q. (By Mr. Grundy) Go ahead.

A. Very well, sir.

It has been the practice in the towing business for towing companies that are acquiring large pieces of equipment, and by that I mean large as to size and as to dollar valuation, to buy that equipment under what is commonly known in the trade as a lease purchase contract. At this time we were acquiring the motor vessel Casteel and the motor vessel Chili Simpson under a lease purchase agreement, wherein for two years we leased the boats at an agreed rental value per month.

The Casteel, we paid $7000 per month as just rent, and until such time as the options were exercised at some subsequent date in accordance with the terms of the particular lease purchase contract, those rental payments

those monthly rental payments, were treated as rent and were charged as expense 100%.

That practice has been reviewed by the Department of Internal Revenue, and in this particular case was approved for the fiscal years, I believe, up through 1952; so that when you look at a figure or look at a statement of Dick Towing Company, in this instance the statement I have in hand, the thing must first be considered that while the rental payments were being charged as expense, they were by the same token, because of our intent to purchase, to subsequently purchase those vessels because we had a need for them, under those contracts we have referred to, we were actually building up equity.

Now, good accounting practice does not indicate that you record the equites as an asset, particularly until title has actually transferred between the person who is receiving the rent and the rental people like ourselves in these particular cases; so we paid on those two vessels $13,000 a month for just those two vessels, the Casteel and the Chili Simpson, which were charged as expense and were deductible for tax purposes; but nevertheless that represented unrecorded equities in that very equipment, because at the subsequent date when we acquired those vessels, the amounts we had paid and previously charged as rent would be considered by the builders or the owners as being amounts paid on the purchase price, and would be sold for a lesser value at the date we actually took title to the equipment; so those points I would like to bring out.

Secondly, this company obtained a certificate of necessity, wherein the Department of Internal Revenue permits the taxpayer to write off over a short period, in this case 60 months or five years, a percentage of the total

acquisition cost of that equipment so certified; and those two large barges we spoke of a moment ago towing under the United States Steel arrangement with John D. Jones, Incorporated, were being written off on a five-year basis, and its cost was in excess of $300,000, and 30% of that cost would have been written off on a five-year period of time, and again is charged to expense. It is merely a procedure that the government has determined for people who were supposed to be and were actively engaged as evidenced by the issuance of the certificate of necessity in some defense work or work vital to national economy, and, United States Steel being a large company primarily engaged in steel activity, we had those barges certified to write them off so that 5% or one-fifth of 70% of $300,000 was charged off every year as expense, as depreciation.

It was accumulated depreciation of what we consider a normal useful life; but nevertheless charged as an expense item; so those are typical of the kind of adjustments to determine the true nature of the operation capabilities of the company's ability to earn money. They were, in some instances, cash items, because the rents were paid monthly, but nevertheless charged off as expense rather than building up equities which, in the true nature they were. That was the net effect, that you built up the equities, but because of the language in the lease agreement, they were permitted to charge them off as expense there for its purpose.

Q. Mr. Daniels, I believe you said in your explanation that those rental payments of $7000 or $13,000 per month, were charged as expense until such time as you exercised the option to purchase the vessel.

A. Until such time as the title passed.

Q. When did title pass?

A. In those particular vessels, the title never passed because the company was forced out of business before it had a chance to actually acquire the vessels. Their operations were stopped and, as mentioned yesterday in my testimony, the fact that the large tow was seized, it canceled out our obligation. We could not fulfill our obligation to make a loading and thus voiding the towing contract with United States Steel, as one example.

Q. As a matter of fact, that large tow, was that the Casteel tow?

A. Yes.

Q. And that was seized by the Lazarre-Simpson Oil Company, was it not?

A. No, it was seized by Captain Fredeman of the Port Arthur Towing Company.

Q. And possession was turned back by your company to the Simpson Oil Company?

A. The Casteel was owned by the River Towboats, Incorporated; and through their lease agreement because title had not passed, they had the equitable right to pick up their boat.

Q. And they did not because the C. J. Dick Towing Company had not kept up the payments prior to bankruptcy?

A. Prior to bankruptcy.

Q. The Chili Simpson, that was from the Simpson Oil Company?

A. Yes, sir, and identical in nature to the reverting back of the Casteel. The Simpson was on a lease agreement in January of 1954 and December of 1953. The payments were not made because of Dick's inability to continue operations and the owner, of course, exercised his equitable right to come and pick up his equipment.

Q. As a matter of fact, Mr. Daniels, C. J. Dick Towing Company did not own the title to either the Casteel or the Chili Simpson?

A. That is correct.

Q. And they were not, as such, assets of the company?

A. That is correct, and not recorded as assets.

Q. And not carried in your asset account?

A. No, sir.

Q. Mr. Daniels, in January of 1953 the Dick Towing Company was very badly in need of working capital to continue its operations, wasn't it?

A. That is right.

The Court: What year?

Mr. Grundy: In January of 1953, Your Honor.

Q. (By Mr. Grundy) And the same was true in the month of December, 1952, wasn't it?

A. That is correct.

Q. Why were they so badly in need of capital?

A. Well, for the very history of this company, and from the very beginning when Mr. Jones, Mr. Casteel and myself took over the operation; and once again I refer to the tri-party agreement in July of 1949, wherein we exercised those rights and powers Dick Towing Company owed — had a considerable indebtedness first of all to the Second National Bank in excess of $300,000.

It also owed other bills to various trade creditors in the course of its operation. The bank — the Second National Bank primarily entered into this agreement because at the time, in July of 1949, it readily foresaw that it could best realize 100% of its indebtedness by the continued

operation of the company, rather than a foreclosure and a forced sale.

We, as operators of the C. J. Dick Towing Company, paid back to the Second National Bank that total indebtedness existing as of July, 1949, at 8% interest, plus all the other trade creditors and bills due and payable at the date of the commencement of our management. That could only be done out of two methods: one was a profitable operation, and two was the sale of equipment which we did not deem necessary to the continued operation of the company, and, if I am permitted, I would like to illustrate on that a little bit.

Some of the equipment Dick Towing Company had in July of 1949 had been acquired during the war years, and it was beginning to deteriorate in its usefulness, barges, towboats; outmoded, canal-type vessels. The general trade then coming into being on the river was the large pusher-type boat, not the smaller square scow-type boat Captain Dick had; so we were faced with the problem of paying the bank back, paying Captain Dick back, paying all the creditors back; and that could only come out of profitable operations or the sale of its equipment.

It did both. It sold equipment and it had operations so that in 1951, less than two years after we took over management of the company, the entire indebtedness had been paid off to the Second National Bank. All of the creditors existing at the time of the tri-party agreement in 1949 had been paid off, and we were faced with the proposition of staying in business and acquiring new, modern equipment if we were to meet the ever increasing competition from other carriers; thus we arranged for the acquisition, through the lease purchase arrangement.

of the motor vessel Casteel and the Simpson because they were late, modern-type pusher-type towboats generally in use and now wholly in use on the Mississippi River and its tributaries; so the history of the company will indicate all through this period people were being paid off as fast as it was possible.

Neglecting to acquire decent equipment in the interim period in 1951 and 1952, we came face to face with the reality that if Dick Towing Company was to continue in business, it must obtain modern, up-to-date equipment; so while the payments were expensive and high — $7000 a month, that is $84,000 a year for one boat just to rent it — we had to outfit the boat, too. You have to find suitable towing rates for the boat. The competition had become increasingly difficult. The advent of pipe lines in the Middle West had cut the market out on fuel oils; this company having no ICC permit for that cargo, could only handle bulk cargos consisting of refining petroleum products and chemical products; so cash was always the short item in the company from its very inception.

Q. As a matter of fact, your income tax return for the fiscal year ending October 31, 1952, did show a loss of how much money?

A. $389,517.21.

The Court: That is the one he has been testifying from?

Mr. Grundy: No, sir; the one he has testified from is the statement of July 31. This other one was identified yesterday by the witness and introduced.

Mr. Wilson: That date was October, you say, of 1952?

Mr. Grundy: October 31, 1952. The other statement

was the statement of July 31, 1952, three months later; so, whatever your accounting adjustment may have been, you did report in your return a 389,000-dollar loss for the year ending October 31, 1952?

The Witness: Taxable loss; that is correct.

Q. (By Mr. Grundy) In December of 1952 and January of 1953, the C. J. Dick Towing Company was very badly in need of working capital, wasn't it?

A. That is correct.

Q. And you were unable to obtain that capital from any source?

A. We had no assets that we could mortgage, thus making it impractical or impossible to approach any commercial institution with the aspect of borrowing money on equipment.

Q. That was when United Towing Company advanced funds in December of 1952 that you were telling us about?

A. That is correct.

Q. At that time the C. J. Dick Towing Company did own, of course, the Green's Bayou capital stock?

A. Correct.

Q. Now, Mr. Daniels, the C. J. Dick Towing Company could not have sold the capital stock at that time for anything like its true value, could it?

A. No.

Q. The sale of stock would be a sacrifice or depreciated value to get some money out of it?

A. It certainly would have.

Q. So, Mr. Daniels, then when United Towing Company proposed to take the capital stock of Green's Bayou and those other assets, notes receivable and accounts receivable, and so forth, you have told us about, in exchange for the satisfaction of a debt of $82,000, which was money they had already let the C. J. Dick Towing

Company have; when United Towing Company made that proposition, the C. J. Dick Towing Company didn't have any choice but to accept that offer, did it?

A. It certainly did.

Q. What choice?

A. It had the choice of repaying the loan, which we knew we were in the process of selling three valuable pieces of equipment of C. J. Dick Towing Company in which we expected to realize in excess of $200,000 cash, and we knew because we had begun negotiations on sale of that equipment; and I say, "We," C. J. Dick Towing Company had begun negotiations back in November or December of 1952.

The equipment was to go abroad to South America. The purchaser had to clear with the State Department officials in Washington because the vessels were under American registry. They had to go through those long formalities, which took two to three months; but in January we knew full well that Dick would be in a postion to pay that loan back in its entirety when it received the money. We thought it would be some time within the next two or three days. They subsequently received the money in February of 1953.

Q. But Dick didn't have that money in December of 1952?

A. No, but we knew they were going to have the money, but we sat down and faced the reality to pay this money back to United Towing Company would place Dick in exactly the same position as it was in in December, when United Towing Company lent the money to Dick Company. We, being officers and directors in both companies, were in position to know the financial condition of Dick.

United Towing Company, while it would like to have had the money back, was perfectly willing to take the stock in the company in lieu and in satisfaction of the debt, bearing in mind United had taken the pledge of t'e stock in December of 1952, but it was understood at that time Dick would be subsequently in a position to pay the cash dollars back; but rather than deprive the creditors of Dick of this $88,000, monies advanced, we were content to let the money remain in Dick for the future use of the creditors and take the stock instead.

Q. And as a matter of fact, when that money was advanced by United Towing Company to C. J. Dick Towing Company in December, it went immediately into the operation of C. J. Dick Towing Company and was expended as it came in, wasn't it?

A. It did. It went to pay creditors and the continued normal operations of the company pay roll, fuel, —

Q. And it is a fact, is it not, you did full well know in 1952 and all during 1953 right up until the date you suspended operations that the C. J. Dick Towing Company was constantly delinquent in numerous of its accounts payable?

A. It was. I talked to numerous of those people. They thoroughly understood the situation. We made payments as we could and they continued to extend us credit.

Q. You did discuss with them and they would write letters demanding payment and wanting to know what was going on, and you as a company embarrassed for capital, you kept putting them off, not you as an individual, but the company?

A. That is correct.

Q. If United Towing Company had insisted on January 26, 1953, on immediate payment of its debt of $105,-

000, C. J. Dick Towing Company would then have not been able to pay it unless it went out and sold some of its equipment?

A. Correct.

Q. And in order to receive some money at that time it would have had to sell it at a forced sale?

A. For a quick sale. I am sure a forced sale route would be the only logical route to follow.

Q. Perhaps forced sale is not a good term, but a sale to raise money, and you would not have realized the true value of it?

A. Not on a quick sale, no.

Q. Now, those Minutes I have just been asking you about with respect to the financial condition of the Dick Towing Company and the fact that it couldn't get capital anywhere else, you as an officer knew that at that time?

A. Yes, correct.

Q. Was Mr. Jones acquainted with those facts?

A. Yes.

Q. How about Mr. Casteel?

A. Yes.

Q. All three of you kept pretty close contact with the operation of the company?

A. Absolutely.

Q. And the condition it was in from day to day and week to week?

A. Absolutely.

Q. Mr. Daniels, what was 1310 McKinney Avenue Limited?

A. It was a partnership consisting of about ten people.

Q. Were you in that partnership?

A. I was in there and Mr. Jones was in it and Mr. Casteel and the occupants of that two-story building of

which there were four in number, leased that building for a period, I think, of 15 years. We had been served with an eviction notice from the Petroleum Building in 1950. Office space in the downtown area was unobtainable. It appeared to be a logical place, location, since it was close to downtown Houston, close to our bank, which we were in very close contact with, and they organized the limited partnership consisting of those eight to ten individuals to lease the property, and in turn the partnership subleased or leased office space to those various companies, C. J. Dick Towing Company, United Towing Company; John Jones and his insurance agency occupied the downstairs floor.

The upstairs floor was occupied by other members of the partnership.

Q. Did John D. Jones, Incorporated, have offices in that office building?

A. Yes.

Q. How many general partners were there in 1310 McKinney, Limited?

A. One.

Q. Who was that?

A. Mr. R. J. Voss.

Q. You have already told us that John Jones & Company was the trade name under which Mr. Jones operated his insurance agency.

A. That is correct.

Q. Did John Jones & Company handle the insurance for C. J. Dick Company?

A. They had handled it for Captain Dick and continued handling it after July of 1949.

Q. That was the way Mr. Jones got into the towing business indirectly?

A. That is true. Captain Dick made him a vice-president when he incorporated the company in 1947 on a non-remunerative basis.

Q. Did Mr. Jones handle insurance for United Towing Company?

A. Yes, he did.

Q. And John D. Jones, Incorporated?

A. Yes, he did.

Q. What about the insurance for 1310 McKinney, Limited?

A. That I couldn't say. I don't know whether Mr. Voss handled it. I don't have anything to do with the management or exercise of 1310 McKinney. I was a limited partner in equal amounts with Mr. Jones and Mr. Casteel. What insurance features there were, I don't know.

Mr. Grundy: I believe that is all, Mr. Daniels.

The Court: Do you wish to examine him now?

Mr. Wilson: Yes, I do.

225 CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Daniels, where did United Towing Company maintain their bank account and what bank did they do business with?

A. They did business and continued to do business in the Fidelity Bank & Trust Company in Houston.

Q. And where did C. J. Dick Towing Company do their banking business?

A. The Second National Bank of Houston.

Q. The Second National Bank of Houston.

They were separate banking institutions?

A. Yes, sir.

Q. Now, Mr. Grundy asked you that question that I believe he used the word "forced sale," which he later qualified. What he meant was possibly a distressed sale or

hurried sale. If C. J. Dick Towing Company had sold their equipment in January of 1953, whether it would not have sold for a smaller sum than it was actually worth, and you said it would.

In your opinion, if C. J. Dick Towing Company had sold its boats and equipment back in January of 1953 in an orderly manner and an orderly sale where they had time to negotiate, in your opinion would they have been able to derive enough money to have paid their obligations?

A. Yes, I think so. Subsequent events have proven, based on actual sales of Dick Towing Company of its equipment, they realized equities in excess of their stated book costs, net depreciated costs, in the aggregate amounts of over $300,000.

Mr. Grundy: Your Honor, I don't want to slow up the proceedings. I would like to extend to Mr. Wilson the same courtesy he has to me, but I do wish a general statement of that nature be limited to the vessels sold for the $300,000 and the dates on which they were sold.

The Court: What do you have to say to that, Counselor?

Mr. Wilson: I think he has the right. Counsel asked his opinion as to what Dick's assets in boats and other equipment and other assets would have sold for at a rush sale. I believe I am entitled to ask what in an orderly sale they would have brought.

Mr. Grundy: My original question was not what they would have sold for, but whether or not the assets would have sold for enough, would have sold for their true value

at the particular date January, 1953; and this answer had to do with the sale of other assets at unnamed dates.

All I wanted to see was if we could get the dates and the particular assets.

Mr. Wilson: I asked him in January of 1953, and I will go further if you would like me to.

Q. (By Mr. Wilson). In your opinion would the boats, the floating equipment, have sold — I will ask you this way — What in your opinion would thy have sold for? Would they have brought costs or less?

A. Far in excess of costs.

Q. Why was that, Mr. Daniels, at that time?

A. As I have previously explained, this equipment had been acquired by Captain Dick at early dates whose depreciation had run on the equipment for a considerable period of time. However, the market — and once again I state in accordance with the schedule I prepared — the market was strong enough that equipment was selling for prices in excess of what we showed as depreciated cost value on our books or depreciated asset values.

Q. Tell me, though, is it a fact or not that you even sold some tugboats and barges for more than they actually cost you, because at that particular time equipment was scarce, just after the war?

A. To a certain degree. Some of this equipment we sold, there was a demand for it. There was a demand for this large boat we sold that went to South America.

Q. Would C. J. Dick Towing Company have had a right to sell its big towboats, the Chili Simpson and the Casteel, and pay off the obligation against it?

A. Obviously they could have sold, although they wouldn't have equitable title. Title had not yet passed. Certainly if C. J. Dick Towing Company had been in a

position to have made money, they could have realized the paid-in rentals they had paid, because the equipment was new and the market for that type of equipment was extremely high.

Q. In other words, in an ordinary sale they could have realized all their equities?

A. In my opinion, definitely.

Q. Mr. Grundy asked you about whether C. J. Dick Towing Company was not badly in need of funds in January of 1953, and you said they were, of course. That is admitted in the pleadings.

As a matter of fact, then, when United Towing Company loaned C. J. Dick Towing Company this $88,500 cash, they actually did C. J. Dick Towing Company a favor, isn't that correct?

I am asking his opinion.

Mr. Grundy: I understand, Counsel, but I am compelled to object to the leading questions. I called this witness as an adverse party. He is a defendant in the lawsuit, and I do not believe Mr. Wilson would have the right to lead him in this matter.

The Court: You are right.

Mr. Wilson: This is cross examination.

The Court: But it is your witness. He examined him, Counselor, as an adverse witness, and when you take him, I don't think you can lead him.

Mr. Wilson: I will try not to lead him, but I do think I have a right to go into what he asked on these matters.

The Court: Would you restate your question?

Q. (By Mr. Wilson) When United Towing Company made the 88,000-dollar loan in January — December of 1952, they actually were doing C. J. Dick Towing Company a favor; is that true or not?

Mr. Grundy: I have no objections. Go ahead.

The Witness: I think it is quite obvious that Dick Towing Company could not obtain the funds from any other source. That has been brought out in the testimony, so that while Dick Towing Company received the benefit of the cash dollars which ultimately flowed to the various creditors, had not we been in the position, and I say "we" again —, Jones, Casteel and Daniels — of knowing the financial condition of those two companies, certainly the money was advantageous to Dick's continued operation.

United Towing Company was not compelled in any manner or way of means of advancing the $88,000. They did not owe it. We could have been perfectly selfish and kept the money in the left-hand pocket, but we believed Dick Towing Company had enough future, based on its contractual future, the contracts in force, the contracts Mr. Casteel was then negotiating, that the company could over a long period of time, not next month or the month after, could be profitably operated for the benefit of all people; and that was the prime motive in passing $88,500 from United Towing Company to Dick Towing Company; but as I have mentioned, at that time again we had a fiduciary relationship to the other stockholders in United not to just put that money over on the table and pick it up and put it in the right-hand pocket and use it and pay it back when you can. There had to be some definite understanding that money would have some security.

The only security Dick had was the stock in Green's Bayou for whatever it was worth, but certainly we thought it was sufficient collateral for the $88,500, and we presumed that Dick would be able, out of future sales of its equipment then being negotiated, to pay back that money to United. United had done Dick a favor, which it had done many times, by lending Dick the money; but in January, rather than take the $88,500 back when we sold this equipment, the equipment Dick was in the process of selling, we decided to leave the money in Dick Towing Company. It can do more good in Dick Towing Company than it can in United Towing Company, but we must agree, to which I have attempted to restore in writing on those Minutes, that United Towing Company take the stock in consideration of its debt.

Q. (By Mr. Wilson) Let me ask you this question, Mr. Daniels: Mr. Grundy has attempted to show, as he stated, and for that reason has offered in evidence these various vouchers, I believe you call them; has attempted to show a comingling of funds between C. J. Dick Towing Company and John D. Jones, Incorporated, and I assume the United Towing Company, and I don't know, he may bring in John Jones & Company.

As you have stated, United Towing Company kept their accounts in a separate bank from the bank C. J. Dick Towing Company kept their accounts in?

A. That is correct.

Q. Did they have separate bookkeepers?

A. They did.

Q. Who kept books for United Towing Company?

A. Mr. Hughes.

Q. And who kept books for C. J. Dick Towing Company?

A. Mr. Treadway.

Q. Were they located in the same or different offices?

A. In the same building, but in different offices. The offices were separate and apart from one another.

Q. Now, he has also offered in evidence — I don't have the exhibit voucher, but vouchers evidencing payments made by John Jones & Company, which is Mr. Jones' insurance company, to C. J. Dick Towing Company.

What were the nature of those payments? Why were they made?

A. They were simply loans to Dick. Counsel, and I presume, never having questioned Mr. Jones — the presumption was there — being president of Dick Towing Company and vitally interested in its continued operations, he pulled or otherwise obtained monies out of his personal account in the insurance company to further promote Dick's operations.

In other words, they were loans, cash advances he obtained, with no security. He never questioned any security.

Q. To continued operating expenses, you say?

A. That is right.

Q. So Dick could continue operating?

A. That is correct.

Q. And that money, where did it go? What was it used for?

A. It was used to pay creditors and conduct the day-to-day operation and labor and fuel, and so on.

Q. There were also vouchers from John D. Jones, Incorporated, which is the company you stated was organized for the purchase of this fuel oil for United States Steel.

A. Correct.

Q. And several vouchers indicate checks came by John

D. Jones, Incorporated, to C. J. Dick Towing Company. What were those checks for; will you explain?

A. They were again in the nature of advances out of monies received from other commission arrangements that John D. Jones, Incorporated, had with outside parties, that it had other funds; and in the course of this business, advanced to Dick money in excess of what it actually owed Dick for the barge charter arrangement.

Q. What were those funds used for by C. J. Dick Towing Company?

A. To pay creditors and continue its day-to-day operations.

Q. Have they been repaid, or were they repaid to John D. Jones, Incorporated, prior to bankruptcy?

A. Not in their entirety.

Q. Do you know of any provision in the by-laws of C. J. Dick Towing Company — you are familiar with the by-laws of C. J. Towing Company?

A. I am.

Q. — that would prevent C. J. Dick Towing Company borrowing money for its operational expenses?

A. None whatsoever.

Q. Then they were doing a perfectly legal act, from your statement?

A. The by-laws were quite broad in their nature. As I recall, when C. J. Dick Towing Company was incorporated, Mr. Carl Stearns wrote the by-laws and made the powers of the president, vice-president, and secretary or treasurer, to be very broad, their capacity in the method of borrowing money.

The Court: Gentlemen, this is my Rotary day. I am going to recess until 2:00.

235 AFTERNOON SESSION — NOVEMBER 17, 1955

The Court: Are you gentlemen comfortable in this courtroom; cool enough or warm enough?

Mr. Grundy: Quite comfortable.

The Court: How about the court reporter?

The Official Reporter: Yes, sir.

235 HOLT P. DANIELS,

the witness who was on the stand at the time Court recessed for luncheon, resumed the stand and continued his testimony as follows:

235 CROSS EXAMINATION, CONTINUED

Q. (By Mr. Wilson) Mr. Daniels, during the year 1952 and slightly prior to that, who was legal counsel for C. J. Dick Towing Company?

A. The firm was Fulbright, Crooker, Freeman & Bates; in particular, members Carl Stearns and Sweeney Doehring.

Q. Mr. Daniels, you recall there has been offered in evidence here —

The Court: Was that at the time this exchange of stock took place?

The Witness: Yes, sir. Yes, sir, Your Honor.

The Court: Did they know about it?

The Witness: Yes, sir.

You are speaking of 1949?

Mr. Wilson: 1952, when the stock exchanged.

The Witness: 1952?

The Court: At the time of the matters complained of here.

The Witness: I would have to qualify that and say I don't know whether they knew the pledge of the stock had been made or not. Mr. Stearns withdrew from the Board of Directors, I believe in 1951.

Q. (By Mr. Wilson) Did the firm still represent the C. J. Dick Towing Company during 1952?
A. Yes.
Q. Up to about what time?
A. Until December of 1953.
Q. Mr. Daniels, you recall Mr. Grundy showing you some boat logs, Chili Simpson logs, this morning, which you identified, I believe, as coming out of the log records?
A. Yes, sir.

The Court: My inquiry about other attorneys was not meaning I thought there was anything wrong about it.

Mr. Wilson: Thank you, sir. I know that.

Q. (By Mr. Wilson) And you recall also on some of the invoices that Mr. Grundy exhibited to you the name "Chili Simpson" was on those invoices too?
A. That is correct.
Q. And that it was testified that some of those invoices which represented lifts or tows were — some of the tows were not made by the Chili Simpson, the Chili Simpson

being in a different area than those represented by the invoices.

A. That is correct.

Q. Can you tell us why that happened?

A. First, it is a common practice in the towing industry, particularly with the large river tows, to assemble those tows at various points.

In other words, the capacity of a large river boat may be measured in numbers of barges or numbers of tons of commodities moved, and you can see to tie up a large river boat to load a barge in Houston, in Corpus Christi, in New Orleans; for that one big vessel to go and accumulate each of those barges would be a rather expensive operation; therefore, it is common practice in the towing industry for the operator who has the contract, has the commitment, to secure outside towing companies to load a barge here, perhaps another at some other point, and take it over to the Mississippi River, preferably New Orleans or some point like that.

They are the focal gathering points for those large river tows; so it is of no consequence that the Chili Simpson might not have loaded some particular tow as designated, because it was the practice of long standing in C. J. Dick Towing Company to place the name of the vessel who would subsequently deliver the material at the designation so the gross proceeds would accrue to the vessel in determining its earning capacity.

So any towing charges for moving that barge would have been charged against that vessel.

Do you follow me?

Q. Yes; yes, I do.

As a matter of fact, I take it from what you said the

showing of the Chili Simpson on an invoice did not necessarily mean one of the other tugs C. J. Dick Towing Company owned might not take that tow or lift?

A. Not necessarily one or the other of the tugs with the C. J. Dick Towing Company, because they contracted with various people such as the Port Arthur Towing Company to pick up barges and shuttle them in the canal over to the river, at which point one of our larger tugs would pick them up and continue up the river, and that tug who picked them up would be the one whose name would appear on the invoice, despite the fact that they might not appear at that loading point.

Q. In other words, the geographic location of the tug at the time the invoice was signed had no relationship as to whether or not that tug did pick up that tow?

A. None whatsoever.

Q. Now, Mr. Daniels, what was the customary, or what form of connection did C. J. Dick Towing Company have for soliciting or being solicited to make those tows or lifts?

A. The majority of the towing done by Dick Towing Company, exclusive of specific contractual operations based on a year or long period of time, what we call spot lifting — in other words, one lift this month and may not make another move for that company for a year — it is a spot — those transactions were ordinarily contracted with Mr. Jones, who was acting in that capacity, either via the telephone or a teletypewriter that we had in our office.

Q. Was C. J. Dick Towing Company ever solicited, that you remember, to make a tow, agree to make it, and then the tow did not develop for some reason or another?

A. It happened quite frequently. We had arrangements

with other carriers who might have a prime contract. They knew we would have, within a certain time, a tow passing in that vicinity. They would either wire or call to Mr. Jones that they would appreciate us picking up a barge here or one in Lake Charles, or two barges, and move the tow from the designated point to the ultimate point or some point on the river; and quite often we would acknowledge that and they would designate rate and tonnage on figures and then because of fog, because of time delays, the customer may have been in a hurry, and they might have had to get some passing boat, which ultimately would cost them more money than if they could wait two or three days for Dick to pick it up. They would have to go on and make other arrangements.

Q. I believe you stated earlier in this hearing the customary procedure was when C. J. Dick Towing Company agreed to make a lift or tow, notes or invoices were prepared and taken over to the bank and pledged for loans.

A. That is true; and often in the course of events in Dick's history, perhaps we picked up a barge for this same company at New Orleans to take to Cairo, Illinois and river conditions and such slowed the tug down. They were desperate. We had already billed them, but because of some condition beyond our control or some relevant thing on the part of the customer, whom they had to please, they would have to take the barge away from us and redeliver it or provide for service elsewhere.

Q. Did it ever happen you would go to the bank and borrow money and the tow would be cancelled?

Mr. Grundy: I have sat by for leading of the witness but I am going to object to that question as leading and ask him to reframe.

The Court: I don't believe that is leading.

Objection overruled, but do not lead the witness. The witness is very intelligent and would be hard to lead, I imagine.

Q. (By Mr. Wilson) Now, Mr. Daniels, it was brought out yesterday by Mr. Grundy in his examination or questioning of you some figures with reference to bills payable on Green's Bayou books to C. J. Dick Towing Company in the form of notes and accounts payable and bills and notes of accounts receivable on C. J. Dick's books due by Green's Bayou Marine Service Company.

A. That is correct.

Q. And I believe you stated — I want to clear this point up, so I am repeating a little, but I have to do it — that C. J. Dick Towing Company had advanced the money to Green's Bayou to purchase this 16 and a fraction acres, and that C. J. Dick Towing Company then carried on their books that loan to Green's Bayou Marine Service Company, which totaled, I believe, approximately thirty-five or forty thousand dollars?

A. That is correct.

Q. In other words, it was shown on Green's Bayou books as being due C. J. Dick Towing Company.

I don't know whether you stated what the purpose of showing that was or not. If you did, I don't remember.

A. Primarily, to go back to the very creation, there were monies C. J. Dick Towing Company advanced to create the Green's Bayou Marine Service Company and represented monies Captain Dick advanced in that creation. They were carried for tax purpose because, bear in mind, and again I ask the Court in use a hypothetical situation and suppose that Dick sold others ownership in

Green's Bayou in December, 1952, or January of 1953, or any time that property which was, of course, the sole asset of Green's Bayou, and received gross proceeds of $100,000. There were encumbrances on that property of $27,000, plus $3000, approximately, unpaid taxes; so that any purchaser would have required first that those encumbrances be paid, which reduced the net proceeds available to Dick by its ownership in the stock to $70,000.

Secondly, and this is a matter of point to me, it is a relative thing, the monies on Dick's books were valueless until and unless those properties were sold, because, and proceeding on this hypothetical illustration, the most Dick could get was $70,000.

If it had $120,000 on its books, it could still only realize 70,000, because that is all the gross proceeds from the sale of the land. That is the total assets of the Green's Bayou Marine Service Company; so in reality we are talking about switching Dick's money from this pocket to this pocket insofar as notes and accounts receivable evidenced on those books were worth; because Dick could only realize that.

The maximum proceeds would be the amount received after the encumbrances were paid off because no purchaser is going to buy Green's Bayou Marine Service Company or buy stock, whether the stock was sold or the land was sold. They are not going to assume those indebtednesses to Dick. I would not buy that this morning without all the encumbrances being paid off against it; so in reality the net increment to Dick on $100,000 cash sale could only be a gross of $70,000, which would have switched the thirty-five or forty-five thousand dollars' worth of notes and accounts receivable by the fact that they owned all of the stock in Green's Bayou.

(Thereupon ten documents were marked for identification by the reporter as Defendant's Exhibits 1 through 10, inclusive.)

Q. (By Mr. Wilson) Mr. Daniels, I show you here what purports to be a photostatic copy of a deposit slip of the Second National Bank in the amount of $10,515, deposited to the C. J. Dick Towing Company account, according to the deposit slip.

Would you explain what that was for and why it was given to C. J. Dick Towing Company?

A. Yes, sir; this deposit slip is dated December 4, 1952. One item in the amount of $10,000 is styled "Lake Tankers, Corporation Manufacturers Trust Company, New York," which is the $10,000 that was the advance payment to United on the tug Roland, the contemplated purchase of the tug Roland by Lake Tankers; and this check indorsed by John Jones as president of United, payable to the order of C. J. Dick Towing Company, and then deposited to C. J. Dick Towing Company account on December 4.

The 515-dollar item is a collection from Columbia Southern Chemical Company in Pittsburgh for the movement of a barge in Dick's regular towing operations.

Q. Do you recall why that check was given to C. J. Dick Towing Company? What were the circumstances surrounding it?

A. I have previously stated, and to clear the record, this is the first of the monies advanced by United Towing Company to C. J. Dick Towing Company in exchange for the pledge of the stock of the Green's Bayou Marine Service Company in December of 1952, and was concurrent with

the pledge, or the actual tender of the stock certificate as a pledge, based on the knowledge that there would be additional monies moving from United Towing Company to Dick subsequent to this date.

Q. Was that the first sum of money turned over to C. J. Dick Towing Company by United Towing Company on their pledge of Green's Bayou stock?

A. It was.

Mr. Wilson: Do you want to make your objection now? I am going to offer them all in.

Mr. Grundy: I want to get to a convenient point.

Q. (By Mr. Wilson) This is a photostat of a Second National Bank deposit slip?

A. Yes, sir. This was a check from United Towing Company to C. J. Dick Towing Company in the amount of $8500, deposited in the C. J. Dick Towing Co. bank account on December 6, 1952, and was part of the monies, as I have previously mentioned, that would be advanced to Dick by United Towing Company.

Q. I don't know whether you know the sequence, or can you tell, in which they came. Was it after this 10,000-dollar advance?

A. Yes, sir, I believe I stated that was on the 4th and this deposit was on the 6th.

Q. I show you what purports to be a check on the Fidelity Bank & Trust Company issued by United Towing Company to the C. J. Dick Towing Company on December 6, 1952, in the amount of $8500.

Will you explain why United Towing Company gave that and under what circumstances that was given to C. J. Dick Towing Company?

A. This check refers to the bank deposit wherein it is traced to Dick's depository bank and was a part of the $88,500 that was loaned or advanced to Dick by United.

Q. For the purpose of the record, that is December 3rd. The deposit slip for $8500 is December 2nd.

The Court: Keep your voice up, please.

Mr. Wilson: I have a cold, Your Honor, and I beg your pardon; but I will talk as loud as I can.

Q. (By Mr. Wilson) I show you Defendant' Exhibit No. 4, which purports to be a photostatic copy of a Second National Bank deposit slip in the amount of $40,000, showing C. J. Dick Towing Company as the party depositing it, in whose account it was deposited, and dated December 8, 1952.

Would you explain the circumstances under which that check was given — that deposit slip was originated?

A. This was another advance by United Towing Company in the form of a cashier's check obtained from the Fidelity Bank & Trust Company in Houston, payable to the order of C. J. Dick Towing Company in the amount of $40,000, and was a part of the consideration and the pledge of the stock early in the month.

Q. Now I show you Defendants' Exhibit 5 and No. 6, one purporting to be a photostat of a cashier's check for $40,000, and one a photostat of a check of United Towing Company for $40,000.

A. Yes, the document entitled Defendants' Exhibit 5 was a check drawn by United Towing Company to the order of the Fidelity Bank & Trust Company in the amount $40,000 on December the 8th to obtain the cash-

ier's check which I have just previously referred to as being deposited in the C. J. Dick Towing Company account on December 8, 1952.

The item marked Defendants' Exhibit 6 is a copy of the bank's cashier's check to the C. J. Dick Towing Company in the amount of $40,000.

Q. Now I show you Defendants' Exhibit 7, being a photostat of a purported deposit slip of the Second National Bank in the amount of $18,000, dated December 9, 1952, and a check written — a United Towing Company check payable to C. J. Dick Towing Company on the same day in the same amount.

Will you explain what that check was issued for?

A. Yes, sir; that is again part of the consideration of the pledge of the stock of Green's Bayou Marine Service Company for a substantial cash advance in the aggregate total of $88,500.

Mr. Grundy: How much was that amount, Counsel?

Mr. Wilson: This figure?

Mr. Grundy: Yes.

Mr. Wilson: $18,000.

Mr. Grundy: And the date?

Mr. Wilson: December 9.

Q. (By Mr. Wilson) I show you here Defendants' Exhibit 9 and Defendants' Exhibit 10. Defendants' Exhibit 9 is a photostat of a purported Second National Bank

deposit slip in the amount of $12,000, to the credit of C. J. Dick Towing Company; and a check for $12,000, dated December 10, made out by United Towing Company payable to C. J. Dick Towing Company.

Is that a part of that same transaction you just mentioned, the 88,000-dollar advance?

A. It is. It is another check from United Towing Company to C. J. Dick Towing Company.

Q. For which the stock was pledged, I believe you stated?

A. Yes.

Q. Was pledged to United Towing Company by the C. J. Dick Towing Company?

A. That is correct.

Mr. Wilson: Defendant will offer in evidence those deposit slips or checks, Mr. Grundy.

Mr. Grundy: For what purpose?

Mr. Wilson: To show the payment of the $88,000 by C. J. Dick Towing Company — I mean by United Towing Company to C. J. Dick Towing Company in the month of December, 1952.

Mr. Grundy: For that purpose, we have no objection; but by so admitting, we do not admit that the advances of the money are evidence of a loan transaction. I understand that the checks are offered to show that the money itself did move on those dates from United Towing Company to C. J. Dick Towing Company?

Mr. Wilson: That is right.

Mr. Grundy: No objection for that purpose.

Q. (By Mr. Wilson) Now, I will ask you further, Mr. Daniels, those checks totaling, and the deposit slips, I believe $88,500 — I think we have added them up — that the checks passed from United Towing Company to C. J. Dick Towing Company, was that money — state what was the money turned over to C. J. Dick Towing Company for, if you know.

A. Well, of course, it was, as all those monies have been advanced and flowed into C. J. Dick Towing Company were used, to pay indirectly for the benefit of its various creditors and the operation of its day-to-day business.

Q. Now, being an officer of United Towing Company, will you state whether or not this transfer of funds from United Towing Company to C. J. Dick Towing Company was a gift, a loan, or just what type transaction it was?

A. It was, at its inception, an advance of money to Dick Towing Company which I have previously stated before, any of those advances it was understood and agreed that United Towing Company must have some security for those considerable cash advances.

We had made cash advances before, but for five or ten thousand dollars; never for amounts of this importance. Therefore, we determined the only available security Dick Towing Company could possibly offer would be the pledge of this negotiable stock in Green's Bayou Marine Service which we took concurrent with the tender of this first 10,000-dollar check we have just referred to.

Q. I do not believe you have stated whether it was a loan, a gift, or just what type of a transaction.

A. It was a loan.

Q. At that time?

A. Yes, sir.

Q. And I believe you stated yesterday on examination by Mr. Grundy that in January of 1953, at a directors' meeting it was suggested and was finally agreed to by the officers and directors of C. J. Dick Towing Company to surrender its redemption rights to its Green's Bayou stock in exchange for a release from United Towing Company of United Towing Company claims against C. J. Dick Towing Company for this $88,000; and I believe there was a prior amount of $35,000, a complete release of all of that?

A. That is correct.

Q. And I believe that was less an amount than it was anticipated C. J. Dick Towing Company would pay back to United Towing Company, you testified to yesterday?

A. Yes.

Q. And I believe you went on, and I am sure of this, that Dick needed some money back, so anticipated a payment of part of this — that United Towing Company anticipated a payment back of part of this money to meet part of its obligation?

A. That was the intent of the parties. I have tried to express that in those Minutes, whether they are adequately expressed or not. I stand to be criticized, or what-have-you, but it was the intent of the parties that United must have in the neighborhood of some $20,000 repaid on the loan; so the total consideration, the agreement, was to be in the amount of $85,000 that Dick would — in consideration for which Dick would turn over irrevocably its title to the Green's Bayou Marine Service Company.

(Thereupon a certain document was marked for identification by the reporter as Defendant's Exhibit No. 11.)

Q. (By Mr. Wilson) Mr. Daniels, I show you here a piece of paper that purports to be a certificate No. 4 for 1000 shares, issued to C. J. Dick Towing Company, bearing revenue stamps and other necessary signatures and seals.

I ask you to look at that and determine whether that is the share of stock that was pledged, that you have testified to, to United Towing Company to secure the 88,500-dollar advance that you have testified to.

A. Yes, sir, this is the certificate dated October 4, 1948.

The Court: Issued by —

The Witness: — Green's Bayou Marine Service Company to C. J. Dick Towing Company for 1000 shares of the authorized capital stock of $10,000 of Green's Bayou Marine Service Company, signed by the president and the secretary. This is the certificate of stock that I removed from the C. J. Dick Company files in December of 1952, the 2nd or 3rd, whatever date it was. I am not specific as to the exact date, but commensurate with the exchange of the $10,000; it had a signature signed "C. J. Dick Company by John Jones, President," attested to with the seal.

Q. (By Mr. Wilson) It bore that as an indorsement?

A. That is the stock certificate I referred to previously as my placing on Mr. Jones' desk and him subsequently turning it over to the United Towing Company bookkeeper, Mr. Hughes, who then placed it in the file of the United Towing Company, and there it stayed until 10/

1/53, at which time I have written "Canceled" across the face when we subsequently issued a new certificate to United.

Q. This is Defendants' Exhibit No. 11.

Now, Mr. Daniels, was this all of the capital stock of Green's Bayou, or a part of it, or what does it represent?

A. That is all of the authorized total outstanding capital stock of the Green's Bayou Marine Service Company.

Mr. Wilson: We want to offer that in evidence.

Mr. Grundy, would it be agreeable with you to substitute a photostat of that later?

Mr. Grundy: I have no objections.

Do I understand you are offering it?

Mr. Wilson: Yes.

Mr. Grundy: No objection, Your Honor.

(Thereupon two documents were marked for identification by the reporter as Defendants' Exhibits Nos. 12 and 13, respectively.)

Q. (By Mr. Wilson) I show you Defendants' Exhibit No. 12, which purports to be a certificate of Green's Bayou Marine Service Company stock made out in favor of United Towing Company of 1000 shares, and is No. 5 certificate; and I ask you, is that the certificate that was — that the C. J. Dick Company stock was exchanged for?

A. Yes, sir, that is the certificate acknowledging on the part of C. J. Dick was no longer the holder of the

stock and had transferred the rights and title to United Towing Company on the first of October, 1953.

Q. I believe you testified that was in exchange for canceling of all of Dick's obligations to United?

A. Correct.

Q. I show you Defendants' Exhibit No. 13, and if you will, tell us what that is, please, sir.

A. That is the stub for certificate No. 5 for the issuance of 1000 shares of Green's Bayou Marine Service Company stock, dated October 1, 1953, the original stock being dated October the 4th, 1948.

Mr. Wilson: I want to offer these in evidence, but I do want to substitute photostats, if I may.

The Court: That is the stock in litigation?

Mr. Wilson: Yes, sir; that is the stock in litigation, Your Honor.

The Court: Claimed by the United Towing Company?

The Witness: Yes, sir.

Mr. Grundy: We have no objection to the offer. We have no objection to the request that photostats be substituted; however, since that is the subject of this litigation, I don't quite know how to approach this.

I think there should be some agreement by Counsel that the original, being withdrawn from the possession of the Court, that it be kept in some safe place by Counsel until the litigation is terminated.

Mr. Wilson: Certainly that is agreeable.

Mr. Grundy: Suppose we agree it will remain in your file and your possession until litigation is terminated?

Mr. Wilson: I think that is definitely good.

Mr. Grundy: Thank you.

The Court: It is time for afternoon recess.

Take a recess for 10 minutes.

(Short recess.)

The Court: You may proceed, please.

(Thereupon two documents were marked for identification by the reporter as Defendants' Exhibit Nos. 14 and 15, respectively.)

Q. (By Mr. Wilson) Mr. Daniels, I show you what has been designated, a yellow sheet, designated Defendants' Exhibit 14; and will ask you to look at it, identify it, and explain to us just what it is, if you will, please, sir.

A. This is a schedule that I have prepared, attempting to show the unrecorded equities in major assets of the C. J. Dick Towing Company as of 12/1/52. It is itemized by vessels. It shows the acquisition costs, the original purchase price to C. J. Dick, less the accrued depreciation to the date of this statement.

Mr. Grundy: Mr. Wilson, until such time as you have offered the instrument, I will object to his testifying as to what it shows.

The Court: The record may be identified and offered.

Mr. Wilson: I offer it in evidence.

Mr. Grundy: May I see it?

The Court: Identify it and mark it as an exhibit.

Mr. Wilson: It has been marked, Your Honor.

The Court: Oh, as it?

Mr. Grundy: Your Honor, we are going to object to the introduction of that statement unless the witness is able to connect it in some way with the books and records of the bankrupt corporation. It appears to be, and he has stated, too, it is those unrecorded equities, which I assume is information he knew about and that did not appear on those books, which, if so, I believe would not be admissible.

The Court: Suppose you develop what it is and then you make your objection.

Q. (By Mr. Wilson) Mr. Daniels, this Defendants' Exhibit 14, this yellow ledger sheet, purports to show — you will have to tell me. I can't read it.

A. The acquisition costs of certain boats and accrued depreciation. Net book equity.

Q. Now, those figures, were they taken from the C. J. Dick Towing Company books?

A. Yes, sir.

Q. And they are correct as represented on the C. J. Dick Towing Company books?

A. Yes, sir.

Q. There is a figure on here, "Fair Market Value," or figures under a column head styled "Fair Market Value." Now, will you tell us how you arrived at those figures?

This is a memorandum I believe you said you prepared yourself?

A. Yes, sir. Under that column or heading appears an asterisk with a footnote on the bottom, stating it is based on actual sales of the aforementioned pieces of equipment so identified by the asterisk, that it is based on recorded sale value as reflected both in the Dick Company books and on the Dick Company tax returns.

The Court: That is calling for values?

The Witness: Yes, sir.

Q. (By Mr. Wilson) I notice another column here called "Unrecorded Equity." Will you tell us how you arrived at those figures or where they came from?

A. They are a summation of the differences by units of equipment between the net book equity and the actual sales value as evidenced by the books and tax returns; so the increment was in effect unrecorded liability, since it represents the difference between the net depreciation values per the books and the amount subsequently received for each piece of equipment.

Q. I notice you have on here tugboats, barges, and a yacht.

A. Yes, sir.

Q. Wll you then, referring to your figures which you have compiled here, tell us what the total —

The Court: Wait a minute.

Mr. Grundy: Your Honor, I withdraw my objection to that instrument, since the witness testifies he prepared it. I am inclined to think the objection would certainly go to the weight of his testimony, rather than the admissibility of those particular items.

I did understand him to say, Mr. Wilson, that that market value was based on actual sales of those particular items, did he not?

The Court: What the witness said?

Mr. Wilson: Yes, sir.

Mr. Grundy: Then I withdraw my objection to the admissibility.

The Court: Go ahead.

Q. (By Mr. Wilson) I noticed on here you have "Paid-in Equity" charged to expense of the Casteel and the Chili Simpson. They are the boats that C. J. Dick did not sell?

A. That is "paid-in equity (charged to expense)" which refers to my conversation this morning with reference to the fact under the lease purchase agreement, while we were charging the amount paid each month on the two vessels, namely, the Casteel and the Chili Simpson, that nevertheless you could consider them for the purposes, I believe it is, in my opinion, to determine what values you have in those vessels in the event you would be able to sell them; and it is my opinion again that the vessels, if sold on a fair value, that Dick Company would have recovered their paid-in equity; but those equities were not recorded because good accounting practice does not dictate recording equities of this type until and unless title has actually passed; but there was nothing to keep Dick Company, had they so desired and had they kept their payments up, to try to sell those vessels and obtain those paid-in equities I am referring to here.

Q. That is your opinion; those could have been obtained by an ordinary sale, I believe you testified?

The Court: Just a minute, Counselor.

All right; go ahead.

Q. (By Mr. Wilson). Mr. Daniels, I believe you stated that those equities would not be shown on the income tax statements?

A. That is correct.

Q. Now, to show fair value of C. J. Dick Company assets, would they have to be added to the tax certificates, or are they part of the tax?

A. They would have to be added to equal the amounts that C. J. Dick Company actually received, based on the sales.

Q. I don't know whether you have, but I will ask you, have you attempted to add them to the assets shown on the income tax statements?

A. I have, yes.

Q. Now, what would be the total of those? I believe you have the total?

A. $317,402.57.

Q. And the date of that memorandum?

A. As of December 1, 1952.

Q. Now, that total added to the income tax statement as of — what would that be?

A. October 31, 1952.

Q. 1952. Would it total, or has it totaled in your addition, more than the liabilities — creditors of Dick?

A. Yes, sir; as I recall, it did.

Q. Now, I show you another yellow sheet, yellow ledger sheet, marked Defendants' Exhibit No. 15.

Will you look at that first, and I ask you to tell us what that is or where it came from.

A. It is the same type of statement that I have just

referred to, with the exception that the equities were projected as of October 31, 1953, which was the year and date of the fiscal year of C. J. Dick Company.

Q. And it did show the same thing as the yellow sheet which you have just testified about, which is Defendants' Exhibit No. 14; and that is Defendants' Exhibit No. 15, with the exception of those values being projected down to October 31, 1953?

A. Yes, sir.

Mr. Wilson: I want to offer that in evidence.

Mr. Grundy: For what purpose?

Mr. Wilson: For the purpose of showing the value of C. J. Dick Company assets as of October 31, 1953. I believe that is the date of the close of the fiscal year.

Mr. Grundy: Your Honor, I don't want to be obstinate about the matter, but I am going to object to the introduction at this time. It may be further questioning of this witness may develop how and in what manner he projected those values down to another date.

The Court: May I look at it, please?

Of course, this witness is figuring, and when I go to consider it, I have to determine whether he figured right.

Mr. Wilson: I was going into that.

The Court: I think the objection is overruled.

Q. (By Mr. Wilson) Mr. Daniels, those figures shown on Defendants' Exhibit No. 15 under the heading "Ac-

quisition Cost," and shows the tugboats Casteel, Chili Simpson, barges, and the yacht Augusta. It shows two barges here, I believe, and then there is another column of accrued depreciation and net book equity.

Were those figures taken from the C. J. Dick Company books?

A. Yes, sir.

Q. The fair market value. How was that arrived at? You have some figures in here for that also.

A. I have shown the fair market values based upon the information that we had for equipment of that class and nature at this date, based on sales, not of this company, but of general sales in the area of equipment of this type and nature.

Q. Now, I ask you this to qualify it a little further: how long have you been connected with towing companies?

A. Well, of course, I have been directly connected with towing companies since January 1, 1948. My father has been a pilot on the Ship Channel since I was a small boy. I have known tugboats, barges, and marine equipment for a long, long time.

Q. And your estimate of that value is based on sales and investigation you have made on similar equipment?

A. Yes, and I would like to add, the values there are conservatively stated.

Q. What is the total — what do you call it, equity — additional equity value?

A. $521,548.31.

Q. Now, did you by chance add that to the C. J. Dick Towing Company income tax statement as of October 31, 1953, which was the end of their 1953 fiscal year?

A. Yes, sir.

Q. And adding it to the assets shown in that statement, did it total more than their liabilities at that time?

A. Yes, sir.

Mr. Grundy: Now, at this time, if the Court please, I am going to renew my objection to the offer of that testimony, all of the testimony of this witness with respect to this memorandum and the other memorandum, on the ground that; first it is based on hearsay testimony, that the values placed on those particular floating equipment, the towboat Casteel, the towboat Chili Simpson, and the barges, are not based on actual sale of those, but based on information they had for equipment of that class.

He did say specifically they are not based on actual sales, and that was information coming from some third person not here before the Court.

I think the statement prepared by that witness is incompetent, the valuation arrived at, for those unrecorded equities.

The Court: As I understand it, this witness' testimony is being offered a good bit like you would offer an auditor's testimony who has taken a set of books and gone through and made a balance sheet or made up accounts, and those auditor's reports are not absolutely binding on the Court.

That is, they don't just prove themselves, but in cases I have tried, I have always gone into those reports and checked them by the evidence that was offered in the case. If I found an item in the auditor's report there was no evidence to support, I would discard it. If I found an item I think is too large or too small, I put in the correct value; and I think this witness' testimony is along the same line, that I would take those figures he has made and I would examine the item and see whether there is evidence to

support those items, or was or was not, and treat them in that fashion.

Is that the purpose they are being offered?

Mr. Wilson: That is one, and the other purpose, possibly I didn't qualify him enough, is that he has also testified he is an expert on values. Just how much of an expert would go to its weight, but being connected with those towboat companies for the past six years and prior to that through his father, he would know something, and having sold equipment in those different companies, would know something about the value of those boats as at those various times.

The Court: He can qualify as to values. I don't have to accept his values. I can take the values and reach my own conclusion as to what they are.

With that explanation, the plaintiff's objection is overruled.

Mr. Grundy: Your Honor, may we have, without the necessity of rising each time — I would like a running objection to the testimony as to that particular statement and an exception to your ruling.

The Court: Yes.

(Thereupon a certain document, consisting of three pages, was marked for identification by the reporter as Defendants' Exhibit 16-a, b, and c, inclusive.)

Mr. Wilson: Your Honor, I have here an appraisal made by Mr. Appelt of the Hugh January Company for which we have a stipulation we may offer it in evidence without proving up its making.

I will offer the whole thing.

Mr. Grundy: I didn't make myself clear, Counsel. Since neither one of our appraisers, by agreement, were going to come and testify how they arrived at those figures, I simply included in the stipulation the totals, and I suggest you keep the record uniform and submit the totals your man arrived at.

Mr. Wilson: Instead of offering this as Exhibit 16, I will just give you the total figures on this appraisal by Mr. Appelt of the Hugh January firm, made on February the 14th, 1955, and purporting to be 16.6300 acres owned by Green's Bayou Marine Service Company and involved in this suit.

Mr. Appelt shows improvements, machine shop, $4000.
Storage shed, $3000.
Warehouse, $500.
Office, $3000.
Total, $10,500.

Land, 16.63 acres at $4750 per acre, or a total of $78,992.50, which with the improvements totals $89,492.50.

Is that satisfactory, Mr. Grundy

Mr. Grundy: That is satisfactory.

The Court: As of what date?

Mr. Wilson: As of February, 1953.

The Court: That is C. J. Dick?

Mr. Wilson: Made for Green's Bayou Marine Service Company, which was owned by C. J. Dick.

The Court: The assets of what company?

Mr. Wilson: The assets of the Green's Bayou Marine Service Company.

The Court: There are three of those corporations, one, the C. J. Dick Towing Company and the Green's Bayou Marine Service Company and the United Towing Company?

Mr. Wilson: Yes, Your Honor.

The Court: Will the record finally show who the stockholders are of each company?

Mr. Grundy: That was stipulated as to Green's Bayou and C. J. Dick Towing Company, Your Honor, and also that those individual defendants and the Pittsburgh lawyer, Harland Casteel, owned substantially all the stock in the third corporation. It will not show who the other stockholders in the United Towing Company were.

Mr. Wilson: I believe that is all, Mr. Grundy.

The Court: Have you any further questions?

Mr. Wilson: None from Mr. Daniels, right now, Your Honor.

Mr. Grundy: Your Honor, I do have some redirect examination of Mr. Daniels. I have had an employee of another corporation not in any way connected with the lawsuit present under subpoena all day, and I asked Mr. Wilson if he had any objection to my deferring redirect examination of Mr. Daniels and putting this man on and perhaps releasing him. He has been sitting here all day and he has no interest in this lawsuit.

Mr. Wilson: I have no objection.

The Court: You will finish by 4:00.

Mr. Grundy: Will you call Mr. Hinton.

270 PHILIP D. HINTON,

a witness called on behalf of plaintiff herein, having been first duly sworn on oath, testified as follows:

270 DIRECT EXAMINATION

Q. (By Mr. Grundy) Will you state your name, please, sir?

A. Phillip D. Hinton.

Q. Where is your residence?

A. 1407 Wakefield Drive, Houston.

Q. By whom are you employed?

A. Dun & Bradstreet.

Q. How long have you been employed by Dun & Bradstreet?

A. For ten years.

Q. What is your present capacity?

A. Consulting reporter.

Q. What do your duties consist of with Dun & Bradstreet?

A. Writing credit reports.

Q. Dun & Bradstreet is a credit investigation firm, is it not?

A. That is right.

Q. And what sort of investigation do you make for your firm?

A. Well, basically we make investigations on reports for credit.

Q. Will you state whether or not during the year 1963 you had reason to make any investigation of the C. J. Dick Towing Company?

A. I did.

Q. Mr. Hinton, you came here under subpoena, I be-

lieve, which was gotten out at the instance of H. A. Phillips, Trustee, plaintiff in this lawsuit?

A. Yes.

Q. And I have previously called on you at your office and discussed the bankrupt corporation with you?

A. Right.

Q. And did I ask you to bring with you your office records concerning this investigation of this company during 1953?

A. That is right.

Q. Do you have them with you?

A. I have them in my pocket.

Q. Would you produce them, please?

(Thereupon three documents were marked for identification by the reporter as Plaintiff's Exhibits Nos. 61, 62, and 63, respectively.)

Q. (By Mr. Grundy) Mr. Hinton, I hand you what has been marked as Plaintiff's Exhibit 61-a, b, c, and d, being four sheets bearing the heading "Analytical Report, Dun & Bradstreet, Incorporated," dated February the 11th, 1953; and ask you to look at those instruments and see if you can identify them, please.

A. Yes, I sure can.

Q. Now, you will have to keep your voice up.

A. Yes, sir.

Q. What are they?

A. They are a total of seven pages comprising the report of the C. J. Dick Towing Company.

Q. Who made that report?

A. I made it.

Q. On what basis did you obtain the information that went into that report?

A. We had an inquiry on C. J. Dick Towing Company.

Q. From some person not connected with the company?

A. Some person not connected with the company.

Q. And when you received that inquiry, what did you do?

A. The inquiries are processed through an involved channel. We get them from a subscriber and are registered in a regular category.

We go out and make a new investigation.

Q. Did you make a new investigation for the purpose of that report?

A. For the purpose of that report, yes.

Q. What sort of investigation did you make and whom did you talk to?

A. Before I went down to C. J. Dick Towing Company, I made up a rather lengthy set of notes, because all r orts change and businesses change, and I talked to Mr. Daniels the day I went there.

Q. Mr. Holt P. Daniels?

A. Yes.

Q. Do you know Mr. Daniels when you see him?

A. Yes.

Q. Is he in the courtroom today?

A. He is.

Q. Which one is he?

A. The third gentleman on this side (indicating).

Q. After you talked to Mr. Daniels at the C. J. Dick Towing Company, what did you do with the information you got from him?

A. It is compiled into this report.

Q. Those four pages I have handed to you?

A. These four pages.

Q. And when that report was completed, what do you and your company do with it?

A. We send it out in the regular distribution to all the people that have made inquiry and are entitled to continuous service on any case.

Q. Does this group of four exhibits here indicate whether or not it was a report that was sent out by your company?

A. I don't quite follow you.

Q. Let me rephrase.

Will you state whether or not that is an office copy out of your company files?

A. This is the regular file copy that is distributed; that is right.

Mr. Grundy: We are going to offer in evidence as Plaintiff's Exhibit 61-a, b, c, and d, the Dun & Bradstreet report on the C. J. Dick Towing Company of February 11, 1953, as being material to tend to prove the financial condition of the C. J. Dick Towing Company at or about that time; and also for the further purpose of tending to prove an actual intent to defraud creditors by the statement therein that the Green's Bayou Marine Service Company was a wholly-owned subsidiary of C. J. Dick Towing Company.

Mr. Wilson: Your Honor, I think it is probably admissible as a report by Dun & Bradstreet, but as to what it may show, what the connection of it is, I don't have time to read it; I would object to it for any reason except offering to show they made a report and nothing else.

My objection may go to weight, rather than anything else. Is that shown too in any way?

Mr. Grundy: No, it is not.

The Court: Is there anything in this report that you didn't get from Mr. Daniels?

The Witness: No, sir, other than on Page 7 there is some information about a suit.

Mr. Grundy: We would be willing right off —

The Witness: Of course, that came from public records, and the information on Page — what is called trade investigation, that did not come from Mr. Daniels. That is a matter of our own investigation.

Mr. Grundy: I don't think that would be admissible information from other persons because it would be hearsay, and I would like to withdraw that page.

The Court: The balance is what Mr. Daniels told you?

The Witness: And what has been compiled over a period of time.

The Court: Compiled from what source?

The Witness: Well, the original — starting over on Page 1 where we start on the personnel, that is the history of the officers, and that was compiled, of course, partly from our own records and partly of what we have been told by Mr. Daniels and the individuals themselves.

The Court: To make the matter short, it seems to me anything in this report that he got from Mr. Daniels or from the Dick Company would be admissible here. He may have changed the wording some, but he tells me he got that part of it from Mr. Daniels, and I believe it would be admissible.

What he got from any other source, unless that source is also in the company, as Daniels was, I don't think it would be admissible.

Mr. Wilson: Could I take him on voir dire for a few questions?

The Court: You have got it mixed in here, so I don't know which part is admissible or not.

Mr. Grundy: I think perhaps we can sort it out item by item.

The Court: You may examine on voir dire.

276 VOIR DIRE EXAMINATION

Q. (By Mr. Wilson) Mr. Hinton, you say what you have typewritten here, Mr. Daniels told you that on this exhibit — Plaintiff's Exhibit 61-a, b, c, and d?

A. Yes, sir.

Maybe I ought to explain to you a little, briefly, how we edit those reports.

Q. Let me ask you this question: did you make the typing of this?

A. No, I do not make the typing.

Q. You do not make the typing. How did you take down the information that is shown here?

A. That is what I want to explain.

When we get ready to write a report, we take our last complete copy of the report, go through it, make notes, call on the concern, and, in this case, I talked to Mr. Daniels and I went through the report; I asked about the officers, if they were the same; asked about the capital stock, if it was the same; then we got down on Page 2 and there is a paragraph called "Method of Operation," and I went into a lot of detail and I talked to Mr. Daniels; and a good deal of that report, I would say 95% of it, came from him.

We got to the next page talking about subsidiary. They have had a subsidiary, and we asked, "Have you still a subsidiary?" and we asked him about it very briefly; and

going over to the next page, Page 4, the figures we had of the two years, October 31, 1949, and 1951 were ones we had received from them; December 31, 1952, figures were figures we got from Mr. Daniels; and the information that is contained in the analysis is gotten from a lot of information we have in our files and is the result of my conversation with Mr. Daniels all the way through to the end of Page 6.

Mr. Wilson: We may be able to shorten this. Let me ask him this.

Q. (By Mr. Wilson) Did you show this to Mr. Daniels and furnish him a copy of it?

A. No, sir, we never do.

Q. You do not know whether Mr. Daniels considered those statements made by him as correct or not?

In other words, it is your compilation on paper?

A. When I talked to Mr. Daniels, I wrote all the information down.

Q. You didn't furnish him a copy to check to see whether he had said those things or not?

A. No, sir.

Q. Then this is your own compilation of what you say he said or think he said?

A. I won't say I think he said. I wrote in down.

Mr. Wilson: I will object to it as hearsay also coming from a —

The Court: I don't think so. The fact that he didn't show it to Mr. Daniels does not make it hearsay or inadmissible, but the part that is inadmissible is the part he did not get from Mr. Daniels.

I think that is perfectly clear, and it seems to me you should in some fashion, if you want it in, separate the

sheep from the goats, or chaff from the wheat, or whatever you call it.

Mr. Grundy: I think that would clear the matter up.

The Court: I will have to exclude it, Counsel. It does include material he didn't get from Mr. Daniels. You can come back and fix it up in the way you want to presently.

Q. (By Mr. Wilson) It is your opinion everything you set out in there Mr. Daniels told you, except the part about the lawsuit?

The Court: I have excluded it, Counselor.

Mr. Wilson: I was just concluding it.

279 DIRECT EXAMINATION, CONTINUED

Q. (By Mr. Grundy) Now, Mr. Hinton, would you look at Exhibit 61-a.

The Court: Is that the same one?

Mr. Grundy: Yes, sir. I want to ask — develop the specific point.

The Court: Don't you think you ought to do that in the morning off the stand, because it would take a lot of time to go through it, and it might be fairer if both Counsel sit down and go over it?

Mr. Grundy: We can probably save time by just doing that. I am perfectly willing to do so. I think we can do the same thing with the other statement I had intended to introduce, and there is a small portion that would not be admissible under the Court's ruling.

I do have one or two other questions.

Q. (By Mr. Grundy) Mr. Hinton, when you interviewed, as in this case, when you interviewed Mr. Holt P. Daniels, where did you interview him?

A. Are you talking about which report?

Q. The report dated February 11, 1953.

A. At the office of C. J. Dick Towing Company at 1310 McKinney.

Q. I believe you testified on your examination by Mr. Wilson that at the time you interviewed Mr. Daniels you made notes of what he said and told you with respect to the company.

A. That is right.

Q. Will you state what you did with that information you got from him, with those notes?

A. Of course, the information was taken back and the report completely re-edited and rewritten.

Q. Did you have anything to do with the rewriting of that report from your notes?

A. Yes, I rewrote it all. Each man investigates his work and writes his own report.

Q. The report you prepared from the information Mr. Daniels gave you, the portion Mr. Daniels gave you, is represented in that report as a memorandum of what he told you; is that correct?

A. That is right.

Q. Now, Mr. Hinton, what has happened to the original notes you made of the conversation at the time?

A. Well, in all cases where a business is discontinued, it depends upon the type of report; but in this particular type where a business discontinues, we weed out our files and keep our last work files, and the rest of the information is gone.

Q. State whether you have with you now all the remaining work papers in your file on this investigation.

A. This is the last of the work papers. I don't have it as to the specific schedules about the bankrupt.

Q. You don't have with you the notes you made at the time you talked to Mr. Daniels?

A. You might find them out on Holmes Road.

Q. They have been destroyed?

A. Yes.

Mr. Grundy: I have no further questions.

The Court: Do you have any questions, Mr. Wilson, for the witness?

Mr. Wilson: No, sir, not until in the morning. I would like to have him further then and I will have some more objections to make then, and I believe time could be saved if we adjourn until in the morning.

The Court: Do you want this witness back in the morning?

Mr. Grundy: I expect we will.

The Court: 9:30 in the morning.

The Witness: Do you want me to bring the entire report, the other schedules, to make this whole report complete, the bankruptcy schedules and everything else?

Mr. Grundy: That is something Counsel and I can discuss with you, Mr. Hinton, and try to work out with you during the recess.

The Court: Can you give me any idea about how far the case will extend?

Mr. Grundy: We don't have very much more. I have some redirect examination of Mr. Daniels.

I have one witness from the bank that will take about 15 or 20 minutes; two depositions, which are short, and I will offer; and then finally a certified public accountant, whose testim -- will probably take about an hour.

That is the best I can say to the Court at this time. I don't know how long Mr. Wilson will take.

Mr. Wilson: I think one other witness is all we will have.

The Court: Is it possible we will finish tomorrow?

Mr. Wilson: I should certainly like to.

Mr. Grundy: We will do our best to shorten it any way possible.

The Court: Very well.
Court is adjourned until 9:30 tomorrow morning.

284 MORNING SESSION—NOVEMBER 18, 1955

The Court: I see you gentlemen are all here this morning. I guess you are feeling pretty good?

Mr. Grundy: Thank you, Your Honor. We hope you are too, Judge.

The Court: Let's see. Who is on the witness stand?

Mr. Grundy: Mr. Hinton, the gentleman from Dun & Bradstreet.

The Court: Do you want to put him back?

Mr. Grundy: Yes, sir.

The Court: Come around, please.

284 PHILLIP D. HINTON,

the witness who was on the stand at the time Court adjourned, resumed the stand and continued his testimony as follows:

284 DIRECT EXAMINATION, CONTINUED

Q. (By Mr. Grundy) Mr. Hinton, I am handing you Plaintiff's Exhibit 61-b, being a page, a printed form

"Analytical Report, Dun & Bradstreet, Incorporated;" and I want to ask you a question: You have previously identified this instrument yesterday. I want to ask you about the last paragraph on that page, beginning with the word "Subsidiary."

Will you state from where you obtained the information which made up that paragraph?

A. This information from which we get that last paragraph was contained in part in a previous report. I would say in all in a previous report. Of course, we keep a record of it each year and when I went out to review the report with Mr. Daniels, I asked him if that was still the same, and read it to him.

Q. You asked him about that wholly-owned subsidiary, if that was about the same on that date?

A. Yes, sir.

The Court: In other words, you took your previous report and discussed it with Mr. Daniels?

The Witness: Yes, sir.

The Court: And he approved of it to the extent you have it there?

The Witness: Yes.

Q. (By Mr. Grundy) And I believe you testified yesterday you made this report after your conversation with Mr. Daniels from the information he had given you; is that right?

A. That is right.

Mr. Grundy: We are going to re-offer Plaintiff's Exhibit 61-b, the information contained in the last paragraph on that page only, which begins with the word "Subsidiary," and in substance states that the Green's Bayou

Marine Service Company is a wholly-owned subsidiary of C. J. Dick Towing Company.

The Court: That is the last paragraph?

Mr. Grundy: Yes, sir, the last paragraph only.

Mr. Wilson: As I understand it, Your Honor, Mr. Grundy is offering this for the purpose of showing that C. J. Dick Towing Company owned Green's Bayou on February the 11th, 1953, and not for the purpose of showing the financial condition of C. J. Dick Towing Company?

Mr. Grundy: No, not for the purpose of showing the financial condition; however, it is offered as an admission of the C. J. Dick Towing Company as of that date, or a representation that it was still the owner of the Green's Bayou Marine Service Company.

Mr. Wilson: I would object to it for that reason, as being a financial report made by Dun & Bradstreet on the condition of the C. J. Dick Towing Company. I consider it probably might be admissible, because as it is, it is written from the penciled notes; but as far as stating an ownership in Green's Bayou, I don't think it is sufficient. However, it may go to the weight, Your Honor.

The Court: I think it is admissible. Objection overruled.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Now, Mr. Hinton, I hand you a sheet which has been identified as Plaintiff's Exhibit 62, being a Dun & Bradstreet report bearing the date April 8, 1953, and I ask you to state where you obtained the information that is contained in that report.

A. I obtained it from Mr. Daniels.

Q. Will you state approximately when you obtained the information and how, if you know?

A. It was obtained in the afternoon on April the 8th. I can recall that, and I recall calling Mr. Daniels on the telephone.

Q. What did Mr. Daniels say to you?

A. Well, he told me what is in this report and some information that is in another report.

Q. With respect to this Green's Bayou Marine Service Company you called him about on that date, did you prepare that memorandum from that information he gave you on that date?

A. From the information he gave me on that date.

Mr. Grundy: We offer Plaintiff's Exhibit 62, being a report in substance to the effect that Holt P. Daniels had stated that the Green's Bayou Marine Service Company was a wholly-owned subsidiary to C. J. Dick Towing Company and had leased its facilities on or about that same date.

We offer that as an admission by the defendants in this case and a representation they were still the owner of the Green's Bayou Marine Service Company.

Mr. Wilson: What is that number?

Mr. Grundy: 62.

Mr. Wilson: You are offering that as an admission?

Mr. Grundy: That is right. As an admission.

Mr. Wilson: An admission of Mr. Daniels'?

No objection, Your Honor.

Q. (By Mr. Grundy) Now I hand you Plaintiff's Exhibit 60-a, which you identified yesterday, and I wish to

ask you about the second paragraph of that exhibit, beginning with the term "Current Investigation."

I wish you to tell me where you obtained the information that went into that second paragraph and approximately when and how you obtained it.

A. As I mentioned previously, I got the information the afternoon of April the 8th on the telephone. What actually happened, one of the other men in the office had had an inquiry on this Texas Shipbuilding Corporation. Because I was writing a report on C. J. Dick Towing Company, he asked if I would assist him, and I called Mr. Daniels and asked him about this shipbuilding company and about the Green's Bayou Marine Service Company; and he told me they had leased the services of the Green's Bayou Marine Service Company to the Texas Shipbuilding Corporation, and the information that was contained in that paragraph was all obtained from Mr. Daniels that date.

Q. I notice this report is dated August the 27th, 1953. Did you have any further conversation with Mr. Daniels about the C. J. Dick Towing Company and the Green's Bayou Company after you had talked to him on April the 8th, 1953?

A. No, I didn't.

Q. Will you state whether or not you prepared the memorandum, the second paragraph of this memorandum I handed you, from the information given you by Mr. Daniels?

A. That is right; I did.

Q. I want to ask you at the same time about Paragraph 4 of this exhibit dated August the 27th, 1953, Plaintiff's Exhibit 60-a, the fourth paragraph, beginning with the words "Daniels further reported that the barges —."

Will you state where and how and under what circumstances you obtained that information?

A. I called on Mr. Daniels on August the 27th at the office of C. J. Dick Towing Company and I asked him about those barges that they had under — were purchasing under a lease agreement, and he gave me that information.

Q. Did you prepare this memorandum, that fourth paragraph, from the information Mr. Daniels had given you when you called on him?

A. That is right.

Mr. Grundy: We offer in evidence the second paragraph of Plaintiff's Exhibit 60-a, which is offered for the same purpose as the two preceding exhibits, to show the statements made by Mr. Daniels to the witness with respect to the Green's Bayou Marine Service Company.

We offer the fourth complete paragraph of the exhibit for the purpose of showing that Mr. Daniels did make also statements to the representative of Dun & Bradstreet with respect to acquiring the title to the barges in that paragraph.

Both we offer as admission by Mr. Daniels.

Mr. Wilson: Your Honor, I don't want to take up a lot of time on these. I thought he stated they were going to be offered as a financial report from Dun & Bradstreet. Now they offer them for the purpose of showing certain admissions.

The Court: I thought he was examining the financial report of Dun & Bradstreet.

Mr. Wilson: He was, but not for the purpose of establishing admissions, but the fact that he made certain reports on it. I don't think it is worthwhile to make the admission.

Of course, he didn't make these. Of course, what he meant is his stenographer or secretary prepared them, be-

cause the only thing they prepare are penciled notes which he said were lost.

The Witness: I don't lose them.

Mr. Wilson: Which had been destroyed.

The Court: You are not objecting to this loss?

Mr. Wilson: No, sir. I think just let it go in, Your Honor.

The Court: My understanding is that he has said and has today copies of the financial report of Dun & Bradstreet, which was made or drawn or prepared by this witness.

Now, he testifies that parts of it were made on the basis of his conversation with Mr. Daniels, and I assume parts were, and I indicated yesterday the parts that weren't admissible. Now you are offering the parts that were made after conference with Mr. Daniels?

Mr. Grundy: Yes, sir; the parts that were offered here made that way.

The Court: All right.

Mr. Grundy: That is all.

292 CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Hinton, for the purpose of the record, Plaintiff's Exhibit 61, which was the first sheet Mr. Grundy showed you on Dun & Bradstreet form head, I believe, and this pink exhibit, Plaintiff's Exhibit 62, and Plaintiff's Exhibit 61-b; that is, 60-a, 61-b, and 62.

Now, I believe you stated you did not prepare those?

A. I dictated them to a stenographer.

Q. You did? From notes, or conversations, or what?
A. From my notes.
Q. And Mr. Daniels, this is the first time he has seen them?
A. As far as I know.
Q. And this is the information he gave you over the telephone?
A. Yes.
Q. And your stenographer typed them just as you dictated them to her?
A. That is right.

Mr. Wilson: I don't have any other questions, Your Honor.

Mr. Grundy: No further questions, Your Honor.

The Court: Stand aside. You are excused.
Do you want Mr. Daniels back?

Mr. Grundy: Please, sir.

Mr. Wilson: Your Honor, for the purpose of clarifying some examination yesterday in the record, it was stipulated by Mr. Grundy, in offering a set of stipulations which I had agreed to, that his property appraiser, Mr. Peckinpaugh, would have testified the value of this Green's Bayou of 16.63 acres was reasonably worth approximately $87,000.

Mr. Grundy: Yes, sir.

Mr. Wilson: And it was also stipulated that Mr. Appelt, the appraiser employed by the Green's Bayou Marine Service Company, would have testified to a reasonable value of $88,000.

It was not, however, specified that those values were gross values, and did not take into consideration the

mortgage figures that were against the property, one in the amount of $27,000 at the time, and approximately $3000 taxes, which would reduce that gross value to approximately fifty-seven or fifty-nine thousand dollars.

I want to show that so that will not be mistaken, since we are not offering the complete appraiser's report.

Mr. Grundy: That is right; with the correction insofar as the statement that those are gross values presented by the appraisers, I am in full agreement.

As to the amounts of the encumbrances, there hasn't been any evidence yet as to what they were at the time of the appraisal, and I believe the evidence will be they were substantially less than the 30,000-dollar figure.

The Court: Are you going to prove that in any way? Is that what you are going to ask him?

Mr. Grundy: Yes, sir.

294 HOLT P. DANIELS,

a witness who had formerly testified herein, resumed the stand and continued his testimony as follows:

294 CROSS EXAMINATION, CONTINUED

Q. (By Mr. Wilson) Mr. Daniels, in December of 1952, and January and February of 1953, what was the approximate encumbrance against the Green's Bayou 16.63 acres due Mr. E. B. Zinnecker, the original owner?

A. It was an unpaid principal balance on the mortgage note in the amount of approximately $20,000. I say "approximately" because it was $19,999.84, plus an unpaid balance on an equipment note that Captain Dick had signed with Mr. Zinnecker in the unpaid amount of $7000. for which Mr. Zinnecker had subordinated or deferred

the principal payment on his mortgage until the equipment notes were paid; so that in logical step, the $7000 would first be paid and the assumption would be the resumption would be made on the payment on the mortgage; so there was $27,000 due and owing Mr. Zinnecker as of that date.

Q. $27,000?

A. Yes, sir.

Q. And were there any taxes due at that time, and can you give us the approximate amount if there were?

A. Yes, sir, there were independent school district taxes and there were state and county taxes in the aggregate amount of approximately $3000. It could be $3010 or $2090. The exact figure, I do not have, because a portion of it has been misplaced.

Q. In other words, it is a simple totaling of an obligation of $30,000 against the property at this time?

A. That is correct.

Q. And assuming the property was worth eighty-seven to eighty-nine thousand dollars, fair gross value, and those obligations were against the property, what would be the net value, its calculated net value?

A. Obviously not in excess of fifty-seven or fifty-eight thousand dollars net cash proceeds after the payment of the encumbrances on the property.

Q. It could be fifty-nine if the other value was eighty-nine?

A. Correct.

Mr. Wilson: Thank you.

I just want to get that clear.

296 REDIRECT EXAMINATION

Q. (By Mr. Grundy) Mr. Daniels, returning to your testimony yesterday about this floating equipment, I be-

lieve you stated the market for towboats and barges fluctuated violently at times?

A. Yes, sir; it always has.

Q. So that, would you say a sum of money which you might be able to obtain for a particular towboat on one date in a year, you wouldn't necessarily be able to get that same amount 30 or 60 days later?

A. That is correct, unless you had a firm commitment.

Q. When you talk about the fair sale value, you meant the price that would be paid by someone that wanted that particular type of equipment at the time you wanted to sell it?

A. That is true; and as a matter of fact, in December of 1952, we were in negotiation, and an agreement of the consideration price was already concluded.

It was a question of the papers, as I have explained, clearing foreign export on the big equipment, and the boats sold in December, 1952; the amount of the consideration had been agreed on prior to December, 1952.

Q. That is not true as to the towboats Chili Simpson and Casteel, because you didn't sell them?

A. That is true.

Q. If you had to sell the Chili Simpson, assuming you could sell a leased vessel someone else had title to, the price would depend on the circumstances under which you were selling it?

A. That is correct.

Q. To that extent that you would have to find a purchaser who needed a transport of that size and towing ability and draft, and so forth, of the Chili Simpson, and who needed it bad enough to pay what you thought was a fair market value?

A. Of course, you are dealing in relative values, what

is a piece of real estate worth and this vessel worth. It is an agreement between some potential buyer and potential seller.

Q. In towboats and barges it is a specialized field that there is not a steady day-to-day market for this equipment?

A. I wouldn't class it as a steady day-to-day market. Certainly there are always, and we received inquiries week after week as to particular classes of vessels, some of which we have had and some of which we may not have had. There was an ever-demanding market for some particular classes of vessels, I would say, continuously. Certainly the country is big enough and there is enough activity.

We didn't have to confine our activity or our market to the Houston-Galveston market. Vessels are sold in Pittsburgh and Minneapolis, and so forth.

Q. Mr. Daniels, you stated yesterday the United Towing Company — did you state the loans of the United Towing Company in December of 1952 in effect kept the C. J. Dick Towing Company alive and operating?

A. They certainly were beneficial.

Q. They kept the company going?

A. Yes.

Q. And without those loans you would have to sell your equipment and go out of business?

A. In all probability.

Q. Your counsel plead that in your answer; if you hadn't gotten that loan and had had to pay back the United Towing Company in January of 1953, you would have had to sell this equipment and go out of business.

A. If you sold all the equipment, of course, you would be out of business. If we did sell parts of the equipment, as we did, we would remain in business.

Q. My question is this: if you did sell those boats and barges, that would put C. J. Dick Towing Company out of business in January of 1953. That is a true statement?

A. If we did; certainly.

Q. If you had to pay United Towing Company the $88,000 in January of 1953, the only way you could have continued was by selling all this equipment?

A. Correct.

Q. Several times yesterday you made reference to the United Towing Company or the C. J. Dick Towing Company as to the left-hand pocket.

You meant by that, in effect, you and John D. Jones and Harland Casteel had the C. J. Dick Towing Company assets and their liabilities in the left-hand pocket, and the United Towing Company in the right-hand pocket?

A. I didn't imply — there was never any intent to imply the language. I was using it as a hypothetical situation; as I recall, in connection with the discussion of the relative value of the notes and accounts receivable owing from Green's Bayou to Dick.

I was attempting, in my own crude way, to disprove there was any value over and above the fact that the owner of the stock would have to sell the land to realize anything out of those notes and accounts receivable, and in that illustration I believe I mentioned the fact that Dick would have actually been taking money out of the left-hand pocket and putting it in the right-hand pocket; but they would have still owned the two pockets, not as between Dick's pocket and United.

Perhaps I didn't specifically clarify that, but I am attempting to do that now.

Q. As a matter of fact, let's get down to what really happened.

You and John D. Jones did have United Towing Company in one pocket and C. J. Dick Towing Company in the other; left-hand and right-hand. That is about what happened in December of 1952 and January of 1953?

A. If you want to call two separate entities in which we managed both those companies; but I can't think of anybody that would put $88,000 out of one pocket into another pocket of a company if they didn't believe, and honestly and sincerely believe, that the other pocket would have a chance to continue its survival and its existence. I don't think there is any normal, prudent businessman, irrespective of personalities, who would be inclined to conduct such a transaction.

Q. That may well be true that the right-hand pocket of United Towing Company wouldn't have loaned the $88,000 to the left-hand pocket of C. J. Dick Towing Company unless the right-hand thought the left-hand could pay it back. I agree with you that that is probably a correct statement, but in effect you had the two corporations under the same directors and stockholders and were operating simultaneously?

A. Yes.

Q. And you knew the condition of both of them every day?

A. Yes. We lived with them.

Q. Day in and day out; and as a matter of fact, when you sold the tug Roland, that was the last piece of floating equipment United Towing Company owned?

A. Except for a barge.

Q. It didn't own that barge?

A. Yes.

Q. What was the name of that barge?

A. NBC 402.

Q. When did it get rid of that barge?

A. It was sold with Dick's other equipment in February of 1953.

Q. I thought you said it was United Towing Company's.

A. It was, and Dick paid them $30,000, the proceeds it collected, because the Long Engineering Construction wanted one equitable title, one bill of sale, for a towboat and four barges.

C. J. Dick Towing Company had only wanted to dispose of the towboat and two old barges. The rest of its barges were new barges and contracted for in a towing contract.

United Towing Company had an old barge and it was sold along with the equipment Dick sold to Long, and I think concluded in February of 1953.

Q. Except for that barge, which you were able to sell for United along with the C. J. Dick equipment, the last piece of equipment was the Roland, sold in November?

A. Yes, exclusive of the barge.

Q. When the right-hand pocket of United sold the Roland, they took however much they received on the purchase price and poured it into C. J. Dick Towing Company, the left-hand pocket?

A. Yes. That is what happened based on sufficient collateral.

Q. You mentioned when you got ready to sell it, you got a 10,000-dollar check for earnest money in December 1952?

A. That is right.

Q. You deposited that to the credit of the C. J. Dick Towing Company?

A. That is right.

Q. You advanced that earnest money before the transaction had ever been closed?

A. That is correct.

Q. What would have happened if the transaction had failed and you would have had to refund that earnest money?

A. You are dealing in a hypothetical situation. Someone gives you earnest money and the mere physical delivery of the boat is to be the only conclusive performance of the contract.

I think it is an abstract assumption you draw that they wouldn't give you the earnest money, because they are not bound by the terms of the earnest money contract.

Q. My question: as I understand the earnest money contract, and let me ask you if you understand one, when they pay you $10,000 earnest money and title has not passed, you don't acquire the earnest money until the title does pass.

A. No.

Q. You know what an earnest money contract is.

You have been a financial officer since 1949 and you testified at great length to the value of the boats, and you know good and well you don't have title to the earnest money until title to the property has passed; but you put that money in the C. J. Dick Towing Company because they needed it desperately?

A. Yes.

Q. Mr. Hughes and Mr. Treadway were subject to your orders and directions, and Mr. Jones's as well?

A. Of course.

Q. Mr. Hughes was the bookkeeper for United?

A. Right.

Q. And Mr. Treadway for C. J. Dick Towing Company?

A. That is right.

Q. When United Towing Company loaned all this money out of the balance of its last major asset in December of 1952, and when it gave C. J. Dick Towing Company $10,000 of an earnest money check that it had received, what corporate action was taken by United Towing Company to authorize that transaction?

A. None. The authority was implied.

Q. The authority was implied.

You didn't have any meeting of the Board of the United Towing Company to authorize the making of that loan?

A. No, sir.

Q. You didn't have any meeting of the Board to discuss the matter of taking this collateral security, the capital stock of Green's Bayou?

A. Yes.

Q. When did you have that?

A. We discussed it on the telephone in an informal way. Here was the money we were to receive. Dick needed the money. In order not to break our fiduciary relationship with the other stockholders of the United Towing Company, who in essence we represented, we had to have some collateral, since there were substantial cash advances.

Q. You didn't have any formal meeting of the Board?

A. No.

Q. You didn't write up any Minutes in this Minute Book?

A. No.

Q. This was a pretty informal relationship here; you and Jones sat down and decided you would take this collateral?

A. Yes

Q. When you took that collateral in December of 1952 you knew they had just completed the fiscal year which showed on the income tax a deficit of $389,000?

A. Yes.

Q. You knew at that time C. J. Dick Towing Company was insolvent?

A. No.

Q. You knew it didn't have enough assets to meet its liabilities?

A No, I did not.

Q. Who were the other stockholders of United Towing Company?

A. Mr. McAuliff, Mr. Parker Davis in Pittsburgh, and another gentleman in Pittsburgh whose names escape me.

Q. What was the outstanding stock of United Towing Company?

A. 1250 shares.

Q. How much did you own?

A. 250, which I still own.

Q. How much did Mr. Jones own?

A. 200.

Q. Mr. Casteel?

A. I would have to consult the stock book on that after they sold a portion of that. I believe it was 150 shares, but I am not sure.

Q. At the outset Jones and Casteel owned 625, I believe?

A. At one time, and I bought from each of them 125, which reduced it down to 500.

Q. What did you pay them for that stock?

A. Par value.

Q. What was par value?

A. $1 a share.

Q. $250?

A. That is right.

Q. Did you ever pour any more capital into United Towing Company?

A. No, sir.

Q. What about Mr. Jones and Mr. Casteel? What did they pay for theirs?

A. Par value.

Q. A dollar a share; so they started out with $625, I believe, in United Towing Company?

A. Yes.

Q. They didn't put any more in it?

A. Not in net cash outlay. They of course rendered services. Mr. Jones, when they were in the Petroleum Building, housed United Towing Company in his insurance office and paid their rent and whatever expenses they had. This was in 1948 in its creation.

Q. Mr. Jones kind of kept United under his wing the whole time?

A. Until I got in there in 1951.

Q. He still had a very definite interest in United as a stockholder and officer and director, even after he gave you some stock?

A. Approximately.

Q. And he never put any more money into United Towing Company in the form of capital investment?

A. No.

Q. So, to recapitulate, Mr. Jones had $250 in United Towing Company and $100 in C. J. Dick Towing Company in 1952?

A. That is right.

Q. And you had 200 or $250 in United Towing Company and $100 in C. J. Dick Towing Company at that time?

A. Correct.

Q. And Mr Casteel had some portion of the balance in United Towing Company which could not have been over $1000?

A. Yes.

Q. And $100 in C. J. Dick Towing Company?

A. That is right.

Q. When you said yesterday that Mr. John D. Jones had made some advances out of his personal account; that is, the John D. Jones & Company check, to promote Dick operation; did C. J. Dick Company give Mr. Jones independently any notes to represent those indebtednesses?

A. No.

Q. How did that come about, from United?

A. Yes.

Q. There was no action to substantiate those borrowings?

A. No.

Q. You have spoken of John D. Jones, Incorporated. I am going to ask you, what was the other income of John D. Jones, Incorporated, besides this United States Steel tow?

A. Various commissions off of brokerage of oil; towing agreements.

Q. Did you anticipate John D. Jones, Incorporated, would make a substantial amount of income?

A. I wouldn't say substantial. It was a creation primarily to protect Dick's interest by buying and selling the oil which Dick could not do. That was the only way in which we could obtain the United States Steel contract.

Q. It was just another corporation created by Jones and you and Casteel for the purpose of engaging in a business that C. J. Dick could not legally engage in and the income would go to the same three people?

A. No, sir; it went to Dick. We never drew a nickel's worth of salary out of John D. Jones, Incorporated, or United Towing Company.

Q. The profits were supposed to go to Dick, if there were any profits?

A. That is right.

Q. When you wrote to Mr. Casteel in August of 1952 about the organization of John D. Jones, Incorporated, you advised him it would make $800 to $1000 a month net?

A. That was our estimate; we could pick up that much business.

Q. All right, sir. Now, just one small point, Mr. Daniels: yesterday you stated that in your opinion certain actions, I believe this borrowing of money or perhaps the action taken in that stockholders' meeting in January of 1953, was a perfectly legal action. It hasn't been brought out in evidence, but you are not a lawyer?

A. No, sir.

Q. You just meant you didn't think there was anything improper or illegal about the transaction?

A. Yes.

Q. You had the advice and counsel of Mr. Harland Casteel?

A. Yes.

Q. He knew what was going on and advised you how to handle it so that would appear proper?

A. We discussed it and, as I say, I wrote the Minutes after the meeting was over and attempted to restore in writing the essential information that passed in those meetings.

Q. Let's talk about those invoices a minute; the ones you gave to the Second National Bank.

You stated yesterday that it was the custom of the C. J. Dick Towing Company, if I remember correctly, you made up invoices and sent them out to customers before you ever did the work; is that right?

A. In some cases, yes.

Q. Can you think of any other occasions besides the ones I have introduced in evidence, being the three Neilson transactions in September and November of 1953 and the Port Arthur Towing Company in September of 1953?

A. Yes, sir. We have invoiced other tow companies, such as "Upper Mississippi Tow Company," for towing and potential towing of equipment that they had assigned to us to pick up for them in which they, at the time of the making of the contract, gave the tonnage, the barge numbers, and all the available information that would avail me to make up the invoice.

Q. Mr. Daniels, you said yesterday you had been in the towing business for quite a long time, and your father was a pilot, and you were pretty well acquainted with the towing business.

You know, as a matter of fact, from your own knowledge, it is not customary in the towing business to invoice somebody for towing work done before you ever do a tow?

A. No, I wouldn't say that. The intent was there. Those people relied on us to pick the equipment up.

Q. Did you expect they would pay you for those bills before you did the work?

A. No; but whether I expected them or what they did is two different things.

Q. I agree with that.

Let me ask you about this invoice, Plaintiff's Exhibit No. 16, which is in evidence, dated November 9, 1953, for Neilson Barge Lines, $15,098.53. That invoice is dated November 9, isn't it?

A. Yes.

Q. It says "Date of shipment, November 8th;" is that correct?

A. Yes.

Q. And you say you are billing those people for the movement of the fuel oil from Shell Oil Company, Deer Park, Texas, to Shell Oil Company in Illinois?

A. Yes, sir.

Q. Did you tell the bank you hadn't done that work and that bill was not yet paid?

A. No, sir; I didn't know we hadn't.

Q. You knew when you made up that bill, didn't you?

A. No, sir.

Q. What did you know?

A. My position was that Mr. Jones negotiated for all the contracts and all those things. He handed me the information for the making up of the bills, and at the time I made them up I had no knowledge.

Q. He gave you the bill?

A. He gave me the information and loading information.

Q. When the president comes in and says to the secretary-treasurer, "Make up a bill to Neilson Barge Lines," you assumed it was correct?

A. Yes.

Q. You didn't make any effort to find out whether it had been done?

A. It wasn't in my province.

Q. You were an officer of the company?

A. I had certain tasks to do which required 10 or 12 hours a day, which I have outlined; discussing conditions with creditors, doing menial duties. We had no bookkeeper at that time and I had to do the typing, accounting, bookkeeping, and all that work in the company.

Q. On November 9 of 1953, when you made up that invoice, did Mr. Jones tell you the C. J. Dick Towing Company was in a desperate position for cash?

A. Correct.

Q. And substantially overdrawn in the Second National Bank?

A. I couldn't recall whether they were overdrawn, but they were in need of cash.

Q. And being pressed by their creditors badly?

A. They were, of course, behind and delinquent in several of their accounts.

Q. In quite a number of them?

A. That is true.

Q. That was November 9th, and as of bankruptcy three months later, you filed schedules of better than —

Mr. Wilson: I haven't interrupted before, Counsel. I have no particular objection to it, but this November 9 is within four months of bankruptcy and we have gone over this before, and it doesn't have any connection whatsoever with the transaction in December of 1952.

I want to make my objection to the examination on that grounds at this time. It is immaterial and irrelevant to what happened in December of 1952 or January or February of 1953.

The Court: Those are the same meetings you went into?

Mr. Grundy: What I am leading up to, I am laying the groundwork to ask him about the assignment he made to the bank.

The Court: I will make the same ruling I made before.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Now, let's look at Plaintiff's Exhibit No. 15, being the assignment of accounts receivable to the bank, November 9, 1953.

Now, I want you to read, if you will, please the para-

graph on that first page of that assignment I am pointing to, beginning with "The undersigned —."

A. "The undersigned warrants that in his (its) own right, he (it) has full and unencumbered title to each of said accounts receivable, that the said assigned accounts receivable are just and due for goods, wares and merchandise sold, shipped or delivered to the respective debtors; that the amounts thereof are correct as set forth on said schedule; and all just and lawful credits, offsets, and counterclaims thereof have been allowed —" (witness completed the reading of this paragraph on Plaintiff's Exhibit No. 15.)

Q. All right, Mr. Daniels; thank you.

Now, Mr. Daniels, was the statement that the said assigned accounts receivable, being the invoices to Neilson for $15,000; was the statement that that assigned account receivable was just and due for goods, wares, and merchandise sold and shipped or delivered, a true statement?

A. As far as I know, it was perfectly true.

Q. Where did you get your information?

A. I just stated that Mr. Jones handed me the loading figures and I presumed he had negotiated a contract with Neilson. We had handled other contracts with Neilson before, and I had no presumption on my part there was anything wrong with it.

Q. Mr. Jones told you the Casteel loaded 3000 tons of oil in barges 20C100 and 20C300 to be towed by the Chili Simpson?

A. Yes.

Q. And that was the movement for the account of Neilson Barge Lines?

A. True.

Q. And he told you to make up an invoice?

A. Yes.

Q. Did he tell you to go over and borrow the money at the bank?

A. Yes.

Q. As a matter of fact, the Chili Simpson was not near Deer Park that day?

A. No, but someone may have towed it over to another point for the Chili Simpson to pick up. It has happened many times.

Q. And you did take that note to the bank, as we have gone into before, took the invoice over, signed the note, and got the money, and it went into the company's account?

A. In good faith.

Q. Let's look for a moment at Plaintiff's Exhibit No. 12, being the invoice to Jack Neilson, Incorporated, being November 5, 1953, in the amount of $7200. Do you recall that invoice?

A. Yes, sir.

Q. And that invoice recites that the cargo was to be moved from Louisiana to Kentucky for the account of Jack Neilson under the date of November 3, 1953?

A. Correct.

Q. To be towed by the M. V. Chili Simpson?

A. Yes, sir.

Q. Is that the same as the Chili Simpson?

A. Yes.

Q. On the 5th the Simpson was to tow these barges to Island, Kentucky, according to this information?

A. Yes.

Q. And on the 9th the same boat was to tow two other barges from Deer Park, Texas, to Wood River, Illinois, according to your information?

A. Yes.

Q. Didn't it strike you as strange the invoices should recite four days apart the same boat should be towing this?

A. Not a bit. The practice had gone on for years as I have tried to outline; and let me try again: large river equipment, such as the Chili Simpson and the Casteel, did not have an assigned number of barges which it moved as a unit year in and year out; or, rather, month in and month out; because on the river, on the Mississippi River, the Ohio River and its tributaries, often those are gathered, just as boxcars are gathered for a train, at various loading points.

They may have been towed there by three different boats to some focal point on the river, at which time it may have been a day, two days, or a week before the motor vessel Chili Simpson would have come down with its empty barges, one or ten. They may have been towing four or five and dropped the empty barges and picked up whatever loads are available; because a big boat like that, to go and load at each particular point, the cost while that boat is standing by loading one barge is prohibitive as compared to some smaller boat who can handle one only while that barge is being loaded and subsequently towed to some focal point; but the whole purpose — it was always the policy of the company to put the name of our vessel, our vessel who would subsequently receive all the revenue which would flow first to the boat, and the invoices and charges from the towing companies would be charged against the boat, thus reflecting some net credit for a given period of time for a stated purpose.

Q. What kind of barge was the M-40?

A. I couldn't tell you.

Q. You described on your invoice to Neilson on November 5, 1953. As a matter of fact, that was a hopper barge, was it not?

A. I couldn't tell you.

Q. It wasn't a C. J. Dick Company barge?

A. No. We had a number of leased barges, a greater number in the last four or five months where I was confined to the office that I never saw.

Q. I show you Plaintiff's Exhibit No. 11, which is the same printed form you just read from a moment ago. In that exhibit you also — the form also states that the assigned accounts receivable are just and due for goods, wares, and merchandise sold, shipped, and delivered to the respective debtors?

Mr. Wilson: Your Honor, I assume I have my running objection to this whole period of time and these questions?

The Court: Yes.

Q. (By Mr. Grundy) When you took that invoice over on November 5th to borrow 5000-some-odd dollars that you borrowed, you didn't tell the bank the work hadn't been done?

A. I didn't know it had not been done.

Q. The subsequent facts proved that hadn't been done?

A. I found out myself it hadn't.

Q. How?

A. Through Mr. Jones.

Q. He told you?

A. He told me, and subsequently we received invoices from Jack Neilson offsetting the charges we had sent him, for what purpose I did not know.

Q. You really didn't know much about it?

A. No, sir. I have explained my duties for the last four or five months was confined wholly to the office. The bookkeeping duties I had to assume when our bookkeeper left in May or June of 1953.

I confined myself to talking to the creditors, which included people like Mr. Hinton, who just testified here, to the actual mechanical details, typing up invoices, typing up checks, preparing payrolls. Those things occupied a good 10 or 12 hours a day that I spent down there in that office.

Q. Why did you have to do all this bookkeeping and somewhat menial office work? Didn't you have a bookkeeper or typist in the office?

A. No. He left in July of 1953 because he informed us he wanted a raise and could obtain a better position. We did not feel we wanted to match the increase in the offer, and frankly, to conserve money, Mr. Jones and Mr. Casteel asked me if I would mind doing the work myself.

Well, I minded, but nevertheless it was an economic situation and there was no one to do the work.

Q. So you really had to put in all the time you could spare on C. J. Dick Company affairs?

A. Yes.

Q. You ran the office, made up invoices, signed notes and the checks?

A. Yes.

Q. All that was done at the order of Mr. Jones, the president?

A. There isn't much order to making up payrolls. You either pay or the men walk off the boats.

All the contracts were in Mr. Jones' province, who either on the telephone or teletype on those spot lists, which we call a listing, like this is a spot listing, and he would obtain the loading information because he would either talk to the ports who had the manifest or he would talk to the people in the traffic department in the companies and furnish me with those loading figures which served as the basis for making up those invoices.

Q. Mr. Daniels, where did you get your education?

A. I first attended Texas A&M in 1940-1942, and I went in the service, was discharged for a heart condition, and entered the University of Texas in 1945 and came out in 1947 and went back to work with J. Phillips Sheffield Company, a firm of certified public accountants.

Q. And right in the same year you went from Phillips to the C. J. Dick Company?

A. On January 1st, 1948, to C. J. Dick Towing Company.

Q. And that was the only business you worked in, except for the few months with Sheffield, until the company went into bankruptcy?

A. Yes.

Q. How old are you?

A. 32.

Q. So in November of 1953 you would have been 30?

A. Yes.

Q. As a matter of fact, Mr. Jones actually ran the United Towing Company, the C. J. Dick Towing Company, and John D. Jones, Incorporated?

A. He was the provincial head, and as being the head of the company, it would naturally fall in his right to discuss with third parties potential contracts, financial matters, and conditions of that sort.

I follow up, because of my accounting background and training, the mechanical detail. I did it myself, and one of the bookkeepers previously employed by me did it.

Q. As a matter of fact, with respect to the notes and the invoices and borrowing from the bank, making up statements, Mr. Jones told you what he thought should be done and what he wanted done, and you went ahead and did it?

A. We knew from the standpoint of borrowing money, we knew from what was previously outlined, that Dick was in need of cash. We were putting all the invoices we could at the bank. We made numerous invoices to people like the Mississippi Towing Company, but that would be $415, and we had one with Southern Alkali for $500. They were weekly type things. They weren't large enough to pledge at the bank, so we just sent the invoices out and they were subsequently paid in due time; but any large sum, I, through the mechanical aspects of it, obtained information from Mr. Jones, prepared invoices, took it to the bank, because it was in the course of my duties.

I think you will find all those notes are signed in my name because I prepared them, and being secretary and treasurer, it was more or less my duty to sign the obligation of the company.

Q. I want to ask you about this invoice assigned to the bank, being Plaintiff's Exhibit No. 19, the 5095-dollar invoice to Jack Neilson, Incorporated The invoice in the sum of $6369.02.

You have already identified that instrument, and that contains the same printed form with respect to the statement by C. J. Dick Towing Company that the account is just and due for goods, wares, and merchandise shipped and delivered to debtor?

A. Yes.

Q. Where did you get the information with which you made up that invoice?

A. From Mr. Jones. The way he received it was either over the telephone or the teletype.

Q. If you weren't present, all you can say is where you got the information?

A. Yes.

Q. You got it from Mr. Jones, and all he told you was to make up the invoice and take it to the bank?

A. That is right.

Q. There is one more item I am looking at, Plaintiff's Exhibit No. 7, another printed form, assignment of accounts receivable, and it covers the invoice to the Port Arthur Towing Company of September 14, 1953, in the amount of $18,100.

A. Yes.

Q. That contains the same statement, assigned accounts receivable are just and due for goods, wares, and merchandise sold, shipped, or delivered to the respective debtors?

A. That is correct.

Q. Where did you get the information through which you made up this 18,000-dollar invoice? The same place?

A. The same place.

Q. Mr. Jones.

And Mr. Jones told you to make up the invoice, pledge it to the bank, and you did do so?

A. Yes.

Q. And the company got the money?

A. Yes.

Q. Mr. Daniels, you have testified at some length about the two items that were liabilities on the Green's Bayou books, the note payable to C. J. Dick Towing Company for $15,000, and the account payable for $22,000.

Those were transferred on October 1, 1953, pursuant to an earlier agreement?

A. That is correct.

Q. Although your testimony was that had the Green's Bayou property been sold at the time of the transfer; I believe your testimony was, if I remember, that had

the Green's Bayou real property been sold October 1, 1953, the purchaser would have had to pay those two debts?

A. The purchaser?

Q. Of the Green's Bayou property.

A. No.

Q. The Green's Bayou would have had to pay them?

A. Yes.

Q. As a matter of fact, United Towing Company and Green's Bayou Marine Service Company didn't sell that property, and United Towing Company still owns the Green's Bayou stock and the Green's Bayou still owns the property?

A. That is correct.

Q. And it is in evidence on May 1st, 1953, the property has been leased at $900 a month?

A. Correct.

Q. And that money has been paid to Green's Bayou, the lessee?

A. Yes.

Q. So doing a little rough arithmetic, in the last two and a half years, approximately twenty-eight or thirty thousand dollars has been collected from that lease?

A. Whatever nine times the number of months would be.

Q. Did Green's Bayou pay out of those sums the note and account of United Towing Company?

A. No, sir.

Q. Mr. Daniels, when Mr. Hinton came out to see you from the Dun & Bradstreet organization, you had a pretty good idea of why he wanted the information, didn't you?

A. He came periodically for credit reports on Dick, which I always cooperated to the fullest extent, brought the books in, laid them down and let him examine them.

Q. There was nothing unusual about Dun & Bradstreet calling on any company to get financial information?

A. It didn't appear to me to be unusual.

Q. When he asked you in February of 1953 whether or not the information about the Green's Bayou Marine Service Company being a wholly-owned subsidiary was still correct, you didn't tell him anything about this binding contract of January to transfer your stock?

A. I saw no reason to. It neither discredited or credited Dick's financial condition.

Q. But you have plead the contract became a binding contract on February the 6th of 1953?

A. Not being a lawyer, I wouldn't know; but they tell me it was.

Q. As an officer of the company you considered the transaction would have to be carried out?

A. Yes.

Q. But you told Dun & Bradstreet for credit purposes, for the purpose of their investigation, that C. J. Dick Towing Company still owned the capital stock?

A. They still did. It was a matter of record.

Q. But you didn't say anything about any obligation of transfer?

A. I saw no reason to.

Q. When he telephoned on April 8th to ask about this lease Green's Bayou had entered into, you didn't say anything to him then about this binding contract to transfer that stock?

A. No, sir, because that particular conversation was with reference to leasing the property; Green's Bayou being a separate entity, it collected its own rents.

Q. When you talked to him on August 27, 1953, when he came out there and asked you again about Green's

Bayou, that was the third time within a period of six months, you still didn't tell him anything about this contract?

A. I didn't consider it important with relation to Dick's financial condition.

As a matter of fact, it would have been better to wipe it off Dick's books because it was a 48,000-dollar assets on Dick's books and their financial statements, but there was a contracredit or liability of $82,000.

Q. You mean the 48,000-dollar asset with respect to the investment account and gain or loss?

A. No. No gain or loss, because no gain or loss is recorded until the property is transferred as a book record.

Q. You carried that as an investment value, as Green's Bayou?

A. Notes and accounts receivable and accrued interest and items went into which was subsequent to '50, because it had not accrued any interest until October.

Q. When you made the transfer of stock, this books entry showed you gave credit to the investment account of capital stock of $10,000?

A. Right.

Q. And you gave credit to those other things, it would be a credit of their assets of $32,000?

A. Yes.

Q. And about a 2000-dollar credit of accrued interest which could be carried as an asset?

A. Correct.

Q. And the difference of $31,000 you showed as a capital gain?

A. Correct.

Q. So that after the stock itself, Mr. Daniels, and I am not talking about actual net or interest, but as to the Green's Bayou Marine Service Company stock, when trans-

fer was made on October 1, you gave that stock credit value of a total of $41,000, didn't you?

A. Stock?

Q. The stock and the capital gain, you gave a value to the stock of $41,000?

A. I don't think in accounting treminology you can call that a credit. The stock was wiped out as $10,000 on the books.

The gain is the difference, which I think we have earned, and agreed upon as the difference between what you receive from something and what your basis is.

Q. Your basis was $10,000?

A. Plus notes and accounts receivable.

Q. And the gain was $31,000?

A. It had to be.

Q. Would that represent a portion of the value of the stock as of that date?

A. In essence it does, yes.

Q. It would, wouldn't it; so my question was as to the stock itself which was transferred on that date, the books showed they considered the investment account of $10,000 and capital gain account of $31,000; taken together, made up the valuation given in that book transfer to that capital stock on October 1, 1953?

A. Yes, it would.

Q. When Mr. Hinton talked to you in August of 1953, about the barges MS 8, 9, 10, and 11, you told him, according to his statement at this time, that the corporation, meaning the C. J. Dick Towing Company, had exercised its option to purchase those barges and had now actual title, and it had a value of $200,000, and owed thirty-five or forty thousand dollars on the equipment?

A. On each barge.

Q. Thirty-five to forty on each barge?

A. On each barge. There was a note recorded down in the Federal Customhouse.

Q. What was the value of each barge?

A. $45,000.

Q. And you owed thirty-five to forty on each one?

A. That is right.

Q. When did C. J. Dick Towing Company exercise its option to purchase those?

A. Offhand, I don't know. Some time in 1953.

Q. Some time prior to the time you told him that?

A. Yes.

Q. As a matter of fact, those barges were repossessed and taken back by the Simpson Oil Company under the lease purchase agreement?

A. No.

Q. How were they acquired?

A. That is a legal maneuver I never understood, but there were mortgages registered showing C. J. Dick Towing Company as owner, and how they came in possession — I suppose through the foreclosure route, but it wasn't through the lease purchase agreement.

The Court: We will take a 10-minute recess.

(Short recess.)

The Court: You may proceed.

Q. (By Mr. Grundy) Mr. Daniels, after January of 1953, what was the position of United Towing Company?

A. Well, they were inactive from the standpoint of towing operations. We were attempting to make brokerage agreements in the name of United, very few of which materialized. We had hoped to be able to get some cash monies back and buy new modern up-to-date equipment so we could go back in the business.

Q. Mr. Daniels, you were testifying yesterday about

Mr. Carl G. Stearns, of the firm of Fulbright, Crooker, Freeman & Bates, and I believe you had stated he had been at one time on the Board of Directors?

A. Yes, when Captain Dick organized the corporation, it is my understanding that the bank had requested Mr. Stearns be on the Board of Directors of the C. J. Dick Towing Company.

Q. Those Minutes of January 28, 1952, bear your signature, don't they?

A. Yes, sir.

Q. The Minutes of the C. J. Dick Towing Company reflect that Mr. Stearns resigned as of that date as a director, don't they?

A. Yes, here it is. He had resigned.

The Court: What date is that?

Mr. Grundy: January 28, 1952, and he had so resigned as a director about that time?

The Witness: Yes; he did request to be relieved of any further duties in connection with the C. J. Dick Towing Company.

Q. (By Mr. Grundy) After he resigned as a director, I believe the law firm of Fulbright, Crooker, Freeman, Bates & Jaworski did continue to do legal work for your company up through December of 1953?

A. Yes, on a retainer basis.

Q. Concerning itself with admiralty business and various legal questions regarding the movement of the boats?

A. Yes.

Q. You did not consult Mr. Stearns about various lending and stock transactions?

A. Yes.

Q. And as to those matters you were advised by Mr. Casteel, though?

A. In the main.

Q. Do you mean you had legal advice by some other counsel as well?

A. No.

Q. What legal advice you did get in November and December of 1952, and throughout the year of 1953 about this corporate transaction between the C. J. Dick Towing Company and the United Towing Company you got from Mr. Casteel?

A. Correct, with one exception. Mr. Jones did talk to Mr. Sweeney Doehring with regard to the creation of John D. Jones, Incorporated. Primarily he asked would it be possible for Dick to buy and sell oil. We had this tentative contract with United States Steel that we had to buy oil, move it, and pull it to United States Steel at one figure.

Q. That was in 1952, was it?

A. Yes, sir, I believe it was.

Q. Just a couple of questions.

I want to ask you two or three things about schedules of unrecorded equities that you prepared after examining the books in the C. J. Dick Towing Company.

Turning first to Defendant's Exhibit No. 14, which is the unrecorded equities as of December 1, 1952, you showed a total thereon of 317,000-some-odd dollars?

A. Yes.

Q. But included in that you have the Casteel and the Chili Simpson?

A. That is correct.

Q. When you testified yesterday that this schedule had been prepared based on actual sales of the equipment of the company, you didn't mean to include in your testimony—

A. Well,—

Q. Let me finish.

—you didn't mean to include the Casteel and the Chili Simpson, that the valuations were based on sales?

A. I did state those items marked with asterisks.

Q. But the testimony was not clear and I simply wanted to define clearly you did not include the Casteel and the Chili Simpson on a basis of sales.

A. That is correct.

Q. And as a fact, the C. J. Dick Towing Company never sold those boats?

A. No.

Q. It lost them through some process for failure to make the payments on them?

A. Correct.

Q. Of course, the same information applies with respect to the statement of unrecorded equities as of October 31, 1953, where you have the Casteel and the Chili Simpson, and you stated yesterday that those were not actual sales. Those were not based on sales of those boats because you never had sold them?

A. No.

Q. You couldn't have unless you arranged to pay off the lessor under the agreement?

A. Yes; and I think I stated yesterday in my opinion the market was strong enough at that time that I felt, once again my opinion, that we could have recovered our paid-in equities in the vessels because they were of late, modern-type equipment.

Q. Well, on October 31, 1953, you were at that point primarily concerned with running the office and doing those other tasks you testified about this morning?

A. Yes.

Q. And the question of what the market consisted of and whether the boats could or could not be sold was largely in Mr. Jones' discretion?

A. Whether they should be sold or not?

Q. Whether they could be sold or not for a certain amount of money.

A. Of course, that is general information. Whether they should or should not be sold would be, certainly, in my understanding, that all of the officers would be in accord, whether the company was to dispose of a particular piece of equipment.

Q. Let me understand one other thing. With respect to those so-called unrecorded equities in Defendant's Exhibits 14 and 15, you would not include those equities in those assets in your balance sheets at any time, would you?

A. That is correct, because good accounting practice does not dictate when you prepare a financial statement you reach out and pick some fair market value. They are treated more conservatively.

Q. It wouldn't have been proper to include those equities in a balance sheet for a purpose of showing assets of a company?

A. That is my interpretation.

Q. And you did not so include them?

A. That is true.

Q. On this Plaintiff's Exhibit 59, being the statement of financial condition to the Treasury Department dated July 31, 1952, you list under your statement of assets and liabilities of the company as of that date, your total assets $864,357.19; is that right?

A. Yes.

Q. And what is the forced sale value you place on those?

A. $607,000.

Q. Would you say that that ratio of 600,000 to 864,000

was a fair estimate at the time of what all of this equipment would have brought if it had been sold at forced sale?

A. At forced sale I think that is fair.

Q. And you know from your knowledge of the towing business that any time you have to sell something like a towboat or a barge at a forced sale, if you can get three-fourths or a half of the value, you will be doing well?

A. Yes.

Q. So that would be a fair estimate at any time of a forced sale of this floating equipment?

A. Yes, sir.

Q. One other question: the certificate of capital stock of Green's Bayou Marine Service Company, being certificate No. 4, which was the one that was, as I understood you to say, surrendered and canceled, this being Defendant's Exhibit No. 11, you testified that that was the certificate for the 1000 shares pledged by C. J. Dick Towing Company to United Towing Company in December of 1952?

A. Yes, sir.

Q. Why is that certificate No. 4? What happened to 1, 2, and 3?

A. One, 2, and 3 were the qualifying certificates at the date of incorporation to Captain Dick's wife, one share to her, one share to Carl Stearns, and 997 shares to C. J. Dick, Trustee; and then on the date after the mortgage payments had been made, the three certificates were canceled and one issued to C. J. Dick Towing Company.

Mr. Grundy: I believe that is all.

The Court: Counsel, you had the witness and you finished with him and passed him to the defendant, and he

examined him and passed him back to you. Are you through with him now?

Mr. Wilson: I had a few questions brought out.

The Court: I was talking to the plaintiff.

Mr. Grundy: I am through with the examination of this witness unless, subject to whatever rights we may have with respect to rebuttal later on in the case.

The Court: Do you want to ask him some?

Mr. Wilson: Yes, sir.

341 RECROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Daniels, Mr. Grundy has asked you about the rental of the Green's Bayou Company property. I believe it started in April of 1953, and the amount was $900 a month that Green's Bayou received from that?

A. Yes.

Q. Will you tell us what that money was used for?

A. Primarily to pay off encumbrances on the yard, taxes, and other operating expenses incident to the maintenance of that property.

Mr. Grundy:: I am going to object to the question on the ground that the best evidence of what was done with the money by the Green's Bayou Marine Service Company would be the books and records and evidence of payment of those various items.

The Court: It seems to me, Counsel, if he knows of his own knowledge, it would be admissible, notwithstanding the books are, too. The objection is overruled.

Q. (By Mr. Wilson) Would you clear up a situation I didn't quite understand you, Mr. Daniels? Did you say that the $20,000, or approximately 20,000-dollar indebtedness due by Green's Bayou to E. B. Zinnecker was a registered recorded mortgage?

A. Yes, it is.

Q. The $7000 was just a note?

A. Was a note; and he requested us, the Green's Bayou Marine Service Company, to first pay the $7000, and to subordinate the payments on the mortgage note until the $7000 was first paid off, which happened.

Q. So the $20,000 was a recorded encumbrance on the property?

A. That is true. A mortgage on the property.

Q. Mr. Grundy also asked you as to whether or why the Green's Bayou Marine Service Company stock was still shown down to October 1, 1953, as belonging to C. J. Dick Towing Company. I believe it is referred to in those Dun & Bradstreet reports?

A. That is a matter of record. There would be no reason and would defeat our primary conference with my tax consultant to show that transfer or that disposition of the assets of the C. J. Dick Towing Company represented by the stock it owned in the company until that date, October 1, 1953.

Q. Until the stock was actually surrendered for transfer?

A. So that any time prior to that date it remained on Dick's books as a matter of record.

Q. Quite a few questions have been asked you about some pledged invoices to the Second National Bank, and I believe you stated yesterday that that was the customary way that tow contracts or lift contracts were handled by C. J. Dick Towing Company, that you would make

up those invoices on the instructions from Mr. Jones and take them over to the bank and pledge them for loans.

Answer this question, if you can: were those invoices ever paid by the customers before the tows were completed?

A. Quite frequently. Let me clear a matter here which I think has been left in the air.

From the very inception of this company's incorporation in 1947, it was the policy of the company with respect to the Second National Bank to finance—I use the term as it implies—its invoices because of the very inherent nature of the business, that the company needed the money at the minute it had the knowledge and the wherewithal to form an invoice to the debtor corporation or the shipper, because Captain Dick at the very inception had explained to the bank that they were protected, insurance carried on the cargo, so their cargo, if it was lost, the freight was earned whether it was ever delivered or not insofar as any act beyond the negligence of the company. Many times during the course of this company, at the time I was involved in the company or even as an employee and office manager, there had been tows loaded for a company. Let's use the name of The Texas Company.

Say the lifting was made from Port Arthur to Mt. Vernon, Indiana, and those invoices were prepared, they were mailed to The Texas Company, and in many cases, paid before that tow was ever delivered.

Further, there were many instances in which a similar-type situation would arise, and because of ice conditions, because of bad fog, or because of some act of God, it was physically impossible to reach the destination.

In the meantime the company had already invoiced The Texas Company, under the hypothetical situation, and the invoice had been paid by the company, but the cargo was never delivered to its ultimate destination; therefore, Dixie Towing Company did not actually earn all of the revenue; but the thing I want to bring out is that at the time the invoice was made, the intent to deliver the specific performance was valid. There were many, many factors which I could enumerate and take a great length of time discussing acts of God, fog, and the inherent nature of the cargo, why there could be only a partial performance or no performance, or in those cases where there were redesignated to some lesser point, we would not earn all those monies.

The towing company would have to re-invoice and remit the difference between the amount collected, predicated on the greater distance, and the amount on the lesser distance, plus having to pay the note off to the bank.

Q. And those situations did develop quite often, I believe you said?

A. That happened the whole time I was with the company.

Q. So you might find a situation, as you testified, where an invoice was pledged to a bank and money borrowed, and for some particular reasons, act of God, or something, you didn't make the tow or the lift, and you would have to go back and pay the note at the bank, or if the tow didn't go its full distance, you would have to re-invoice the customer and remit the proportionate part back to the customer?

A. Plus paying the bank back.

Q. Did you have any objections from the customers?

A. We never had any objection.

Q. Mr. Grundy has asked you much about a transaction. I didn't quite get it.

In January, 1952, with reference to sale of boats and equipment by C. J. Dick Towing Company, which I believe you stated had been in the making or in discussion in December of 1952, which was why you knew Dick would be able to pay some of the money back?

A. That is correct.

Q. Now, that sale was of numerous items of equipment, I believe you called it a package unit?

A. That is the agreement we had with the purchaser. That was for a demand of "X" number of barges and a boat for use in South America.

Q. C. J. Dick Towing Company handled the whole sale, but other companies' boat units were in there. I believe you said one 30,000-dollar barge by United?

A. I would have preferred to have those sales and had separate instruments recording those sales for each one of the companies that owned the vessels. They insisted on a package deal. They wanted to work through one person. Dick acted and collected and sold that barge for United and paid United the gross proceeds for its barge.

Q. You said the sales Dick made on the package unit in February of 1953 totaled something over $200,000?

A. Yes.

Q. And at that time Dick could have paid United its money back, but it would have left Dick in the same position before the borrowing of the $88,000?

A. Yes.

Q. I have got that straight now?

A. Yes.

Mr. Wilson: I believe that is all.

347 REDIRECT EXAMINATION

Q. (By Mr. Grundy) Mr. Daniels, those transactions about which you have just testified in which you did make up an invoice, borrowed the money at the bank, and sent out the invoice, even though the work had not yet been done; and then, as you say on many occasions, for one reason or another, you didn't do the work or do all the work called for by the invoice when you had to make refunds to the debtor on that particular invoice for the money you might have collected from them, and you had to take up those notes at the bank, you would make proper entries in the books and records of the C. J. Dick Towing Company to show the disposition of those matters?

A. Surely.

First you would have to reduce the gross revenue.

Second, for refund on demand from the shipper, the amount he paid in excess of what was actually earned; and third, pay the note to the bank.

Q. And you did make entries in the books which would reflect those transactions?

A. Yes, sir.

Mr. Grundy: No further questions.

348 MARY ALICE DIONNE,

a witness called on behalf of plaintiff herein, having been first duly sworn on oath, testified as follows:

348 DIRECT EXAMINATION

Q. (By Mr. Grundy) Will you state your name, please?

A. Mary Alice Dionne.

Q. By whom are you employed?

A. The Second National Bank.

Q. I will ask you to keep your voice up.

The Court: How do you spell your name?

The Witness: D-i-o-n-n-e.

The Court: Any kin to Jack Dionne?

The Witness: Yes, sir, half-sister.

Q. (By Mr. Grundy) You are the personal secretary of Mr. H. M. Seydler? Vice-president of the bank?

A. Yes, sir.

Q. How long have you been his secretary?

A. Fifteen years.

Q. Are you personally acquainted with Mr. John D. Jones, president of the C. D. Dick Towing Company?

A. Yes, I am.

Q. Do you see him here in the courtroom?

A. Yes.

Q. Sitting next to Mr. Wilson?

A. Yes.

Q. And you are personally acquainted with Mr. Holt P. Daniels, secretary-treasurer of that company?

A. Yes, sir.

Q. Sitting behind Mr. Jones?

A. Yes, sir.

Q. Miss Dionne, will you state whether or not the Second National Bank received from the C. J. Dick Towing Company a financial statement as of October 31, 1952?

A. Yes, we did.

Q. Do you have that statement?

A. Yes, it is in the file.

Q. Would you produce it, please, ma'am?

Now, Miss Dionne, how did the statement come in to the bank?

A. It came in by mail or with a covering letter. Either by mail or messenger with a C. J. Dick Towing Company letter of February the 6th, 1953, signed by Holt P. Daniels, Jr., secretary and treasurer. It is manually signed by him, by his secretary.

Q. You know Mr. Holt P. Daniels' signature?

A. Yes. This is not his signature.

Q. Miss Dionne, did you say you had been Mr. Seydler's secretary for 15 years?

A. Yes.

Q. This little mark under there you interpret to mean someone signed for Mr. Daniels?

A. Yes.

Q. Was that received through the mail by the bank?

A. Yes, sir.

Q. And did that letter contain the statement of October 31, 1952?

A. Yes, sir.

Q. Has that statement been in the file of the Second National Bank with respect to the C. J. Dick Towing Company since that time?

A. Yes, sir.

Q. I believe I asked a day or so ago that a copy be removed and sent over here to the courtroom.

A. Yes, sir.

Q. Will you state whether or not I returned that copy to you?

A. Yes, sir, it has been returned and I placed it in the file.

Mr. Grundy: We are going to offer as Plaintiff's Exhibit No. 63 the letter of February 6, 1953, of the C. J. Dick Towing Company, and the copy of the financial statement attached thereto as of October 31, 1952, for the purpose of establishing the fact that those defendants had an actual intent to hinder, delay, or defraud their creditors.

We propose to show by expert testimony this was a false financial statement in a substantial amount of money.

Mr. Wilson: I have no objection to the financial statement, Your Honor, if it was actually given to the bank.

The Court: I imagine you can verify that.

Mr. Wilson: Yes, sir.

I think the only objection I would have as to its showing a complete total actual value, fair market value, of all of Dick's assets. It may show all of what its liabilities, but financial statements, as testified by Mr. Daniels before, are made up on a depreciated value.

The Court: It looks like your objection would go more to admissibility—to weight than to admissibility.

Mr. Grundy: May we have the reporter make photostatic copies of those two documents, of the one exhibit, so the bank's originals may be returned to the file, of the letter and statement of October 31, 1952?

Mr. Wilson: No objection.

(Thereupon the documents referred to above were marked for identification by the reporter as Plaintiff's Exhibits Nos. 63-a, b, and c, inclusive.)

Q. (By Mr. Grundy) Miss Dionne, will you state whether or not the Second National Bank received from the C. J. Dick Towing Company a financial statement and balance sheet as of October 31, 1953?

A. Yes, we did.

Q. Do you have a copy of that statement?

A. Yes.

Q. Miss Dionne, you have turned to a statement in the file as of October 31, 1953. There appear to be five pages of that statement. Is that right?

A. There are more than that. That is attached to some other exhibits.

Q. Hold your voice up a little, please, ma'am.

A. Actually along with that statement there are seven pages, including the financial statement as of October 31, 1953, and mortgages of record as of November 30th and various other schedules.

Q. Were all those various pages brought in as one instrument and brought in together?

A. They were.

Q. How did they get to the bank?

A. Those were delivered to us by Mr. Jones and Mr. Daniels.

Q. Approximately as of what date?

A. Within a week between December 21 and December 30th,

Q. Of what year?

A. 1953.

Q. And did you place those statements in the bank's C. J. Dick Towing Company file?

A. Yes, sir.

Q. Have they remained there until this time?

A. Yes, sir.

(Thereupon the documents above referred to were marked for identification by the reporter as Plaintiff's Exhibits Nos. 64-a through 64-g, inclusive.)

Mr. Wilson: I assume these last two offered exhibits, Plaintiff's Exhibit 64-a and 64-b, c. d, e, f, and g, purport to show the financial condition of the C. J. Dick Towing Company as of November 30th, 1953, and October 31, 1953, and assuming Counsel shows that they were sent to the bank by the C. J. Dick Towing Company or its officers, I want to make my objection to them as being too remote, the same objection I have been making all along here, in point of time to have any connection with the transaction of December of 1952 and January and February of 1953.

The Court: The same ruling.

Mr. Wilson: Note our exception.

Mr. Grundy: To make the record perfectly clear, that exhibit, those seven pages, that exhibit is offered for the purpose of showing th[illegible] that financial statement was given to the bank by C. J. Dick Towing Company as a statement of its financial condition as of the date shown.

May we have the same agreement with respect to photostating and substituting a photostat copy in the record?

Mr. Wilson: Yes, you certainly may.

Q. (By Mr. Grundy) Miss Dionne, during the month of December, 1953, did you have any conversation, or were you present at any conversations between Mr. Seydler and Mr. Jones and Mr. Daniels?

A. Yes, sir.

Q. Were you present at a conversation approximately December 21, 1953, between Mr. Seydler and Mr. Jones and Mr. Daniels?

A. Yes, sir.

Q. Miss Dionne, were you familiar with a transaction by which the C. J. Dick Towing Company borrowed money from the bank upon a note and assignment of an account receivable—upon two notes and two assignments of accounts receivable—to the Jack Neilson and Neilson Barge Lines in Louisiana in the month of November, 1953?

A. Yes, sir.

Q. Will you state what was said at this conversation between Mr. Seydler, Mr. Jones, and Mr. Daniels, with respect to those two notes and invoices?

Mr. Wilson: I will object to that. Mr. Seydler is not in court and it would be hearsay. The bank is not a party to the lawsuit and any statement that the bank might have made over there testified to by a second witness, I believe is inadmissible and too remote in this case.

The Court: As I understand, you propose to offer what the Dick people said?

Mr. Grundy: And what Mr. Seydler said in the presence of the Dick people.

The Court: The Court will let her answer the question. You may make your objection and I will rule later. Some might be admissible and some not.

Mr. Grundy: You may answer the question.

The Court: In order to give me the picture, who was present at that conversation?

The Witness: Mr. Jones, Mr. Daniels, and Mr. Seydler, and I was taking notes.

Mr. Wilson: I think again, Your Honor, I want to make this objection; that it should be directed as to what any particular party said and not what was said, what Mr. Jones said, if you want to make that, or what Mr. Daniels said, or what Mr. Seydler said; and, of course, my objection to the over-all testimony which the Court will rule on later.

The Court: It seems to me in this conversation what he said would be admissible; so I overrule that part.

Mr. Wilson: I want to make the further objection that the stenographic notes would be the best evidence of what was said, not by memory on it.

The Court: It is not a legal document, the notes. The objection is overruled.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Miss Dionne, one question before you answer that last one: you stated a moment ago you took notes on the conversation; did you thereafter prepare a memorandum from those notes?

A. Yes, sir.

Q. And do you have that memorandum before you now?

A. Yes, sir.

Q. And have you looked at that memorandum for the purpose of refreshing your recollection before testifying in this case?

A. Yes, I have.

Q. Now, Miss Dionne, would you please answer the question as to what was said in that conversation between Mr. Seydler, Mr. Jones, and Mr. Daniels, while you were present, with respect to the two Neilson invoices of November, 1953?

A. Mr. Seydler asked Mr. Jones to explain each of the invoices we had securing our notes. The two Neilson invoices, Mr. Jones told Mr. Seydler, were consigned work which they planned to do. They made up the invoices and pledged them to the bank, but because of a fog delaying their boat, they were unable to keep the assignment; and therefore the work was never performed and the amount represented by the invoice was never earned.

Q. Miss Dionne, I asked you to examine the bank records with respect to a sight draft for approximately $18,000 on the Port Arthur Towing Company which was deposited by the C. J. Dick Towing Company on November 21, 1953.

I will ask you now whether you made such an examination of the records.

Mr. Wilson: I want to renew my objection as immaterial and irrelevant in point of time, too remote from the transaction in December, 1952, and January and February of 1953.

The Court: The same ruling as heretofore.

Q. (By Mr. Grundy) Did you make such an examination?

A. Yes, sir.

Q. Miss Dionne, what did the records of the Second National Bank reflect with respect to that sight draft?

A. C. J. Dick Towing Company drew a sight draft on the Port Arthur Towing Company of Port Arthur on November the 21st, 1953, in the amount of $17,854. The proceeds of this draft were credited to their account and the draft sent forth for collection in the usual way; and on November 30th, 1953, it was returned from the Port Arthur bank unpaid, with the notation "No Response to Notice."

Q. Now, Miss Dionne, you are looking at two photostat copies. I ask you first whether the top one—what is that a photostat copy of?

A. That is a photostat copy of our charge back to their account when the draft was returned unpaid.

Q. Is that part of the records of the Second National Bank?

A. Yes.

Q. Did you have that made for the purpose of bringing over to this lawsuit today?

A. Yes.

Q. The other instrument labeled "Customer's Draft"—

A. That is a photostat copy of the draft itself as presented.

Q. Is the original of that instrument in the records of the bank?

A. No, sir.

Mr. Wilson: Your Honor, may I throw in a little objection here to the leading form of the question? He could ask, "Where is the original of that?" or "Is it in the bank?" I have permitted it to go on for the sake of time, but I believe we ought to confine ourselves.

The Court: It is a leading question.

Q. (By Mr. Grundy) Miss Dionne, do you know where the original of that draft is?

A. The original of the draft is returned to the customer the same as any canceled check.

Q. Will you state whether or not the bank has a record in those files of that draft?

A. I have a photostat of every check paid.

Q. Where did this photostat come from?

A. From our records.

The Court: You mean the draft is returned to the C. J. Dick Towing Company?

The Witness: Yes, sir.

Mr. Grundy: Plaintiff offers Exhibit No. 65, being a photostat copy of a sight draft of November 21, 1953; and Exhibit 66, being a photostat copy of notice that the draft had not been paid, in connection with his previous offer of the note and assignment of accounts receivable and the testimony of Captain W. F. Fredeman of the Port Arthur Towing Company, as part of the offer tending to prove defendants had an actual intent to defraud their creditors.

(Thereupon the two documents above referred to were marked for identification by the reporter as Plaintiff's Exhibits Nos. 65 and 66, respectively.)

Mr. Wilson: I would object to it as being remote in point of time and irrelevant and immaterial to any issue in this case. I object to those exhibits, Plaintiff's Exhibits 66 and 65.

The Court: Same ruling heretofore made.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Now, in this case, Miss Dionne, will it be satisfactory to release those two photostat copies to the reporter?

A. Yes, sir.

Q. You have other copies in the bank's file?

A. Yes, sir.

Mr. Grundy: That is all.

Mr. Wilson: No questions.

The Court: You are through with this witness?

Mr. Grundy: Yes, Your Honor.

The Court: She may be excused.

Mr. Grundy: May the witness be released?

The Court: Yes, sir.

361 EDWIN I. DAVIS,

a witness called on behalf of plaintiff herein, having been first duly sworn on oath, testified as follows:

361 DIRECT EXAMINATION

Q. (By Mr. Grundy) State your name, please, sir.

A. Edwin I. Davis.

Q. Mr. Davis, it will be a little hard for us to hear you out here, so keep your voice up, if you will, please.

Q. What is your profession?

A. Certified public accountant.

Q. How long have you been a certified public accountant?

A. Approximately seven to eight years.

Q. Where did you receive your training and what did it consist of?

A. I graduated from the University of Texas in 1941 with a B.A., major in accounting. I have done post-graduate work, some at Harvard Business School, some at the University of Houston.

I have had accounting experience with one or two oil companies. I have worked for public accounting firms prior to opening my own practice. I did accounting work as an Internal Revenue Agent for the United States Treasury Department several years.

Q. When were you employed by the Treasury Department as a revenue agent?

A. Approximately 1948. I would have to go back and see the exact date.

A. I would have to go back and see the exact date.

Q. And approximately how long did you work for the Treasury Department?

A. Something over two years.

Q. What is your current occupation?

A. I have my own public accounting practice.

Q. Where is that located?

A. Houston, Texas.

Q. How long have you been so occupied?

A. Approximately five and one-half years.

Q. Now, Mr. Davis, were you—will you state whether or not you have been employed by the trustee in bankruptcy, H. A. Phillips, of the C. J. Dick Towing Company, for the purpose of making certain examinations of the books and records tendered to you and testifying in court as to the result of those examinations?

A. Yes, sir, I have been employed, although I have not seen the order entered.

Q. To make the record perfectly clear, state whether or not you have been advised by me, as attorney for the trustee, you were so employed?

A. Yes, sir, I have.

Q. And you have made the examination, have you not?

A. I would like to qualify the term "examination."

The term "examination" among accountants generally connotes a complete audit has been made, and I have not made any audit. I have made a review of certain records submitted to me and represented to be those of C. J. Dick Towing Company. I reviewed them and compared with them various figures in the books and various other statements.

Q. Mr. Davis, I am going to hand you first a group of ledger sheets bound together, marked Plaintiff's Exhibit No. 24, inclusive, and a brown manila envelope bearing on the outside "General Ledger Sheets, November 1, 1951, through October 31, 1952;" and ask you to state

whether or not you have seen those ledger sheets before today.

The Court: Is that anything that has already been offered?

Mr. Grundy: Yes, sir. It was identified by Mr. Daniels as the general ledger sheets for the period in question of the C. J. Dick Towing Company.

The Witness: Yes, sir; I have received these.

Q. (By Mr. Grundy) Mr. Davis, I am going to ask you to state whether or not you have prepared, and had prepared under your supervision of people in your office, a balance sheet of the invoices contained in those ledger sheets as of October 31, 1952?

A. Yes, sir, I have.

Q. Do you have that instrument with you, sir?

A. I have my work papers on it, yes, sir.

Q. Would you produce them, please?

The Court: It is about noontime. Before you go into that, the Court will recess until 2:00.

AFTERNOON SESSION — NOVEMBER 18, 1955

365 EDWIN I. DAVIS,

the witness who was on the stand at the time the Court recessed for luncheon, resumed the stand and continued his testimony as follows:

365 DIRECT EXAMINATION, CONTINUED

Q. (By Mr. Grundy) Mr. Davis, I am going to hand you again Plaintiff's Exhibit No. 22, which has been identified as a copy of the income tax return of the C. J. Dick Towing Company for the calendar year October 31, 1952.

I am going to ask you to examine that instrument and do you find thereon the balance sheet, statement of assets and liabilities, that it contains as in October 31, 1952?

A. I have the balance sheet before me, Schedule M of the return.

I beg your pardon; Schedule L.

Q. Now, Mr. Davis, what are the total amount of assets scheduled on that return?

A. The total amount of assets as listed on the return for the fiscal year ended October 31, 1952, total assets, are $1,065,133.16.

I notice on here that includes an item of treasury stock as an asset, and I don't believe that is to be considered as an asset on the balance sheet.

Q. What are the total liabilities on that particular schedule?

A. The total liabilities as shown on the schedule, one—I beg your pardon; I am reading the total.

The total on the return shows liabilities and capital. To give the exact total of liabilities, I would have to add up individual liability accounts here.

Q. Does your statement reflect any entry for net worth or earned surplus of the company?

A. Yes, there is an item on the return, on the balance sheet we are looking at, Items 15 and 16, which are items of surplus.

Item 15, paid-in and capital surplus.

Item 16, earned surplus and undivided profits.

Q. What is Item 15?

A. Item 15 amounts to $17,120.53, and that is shown as a red figure, and I take it to mean that is a surplus deficit.

Q. What is the other surplus item, No. 16?

A. Earned surplus and undivided profits, $165,053.85. It is likewise a red figure, and I take it that is a surplus deficit.

Q. I want to show you Plaintiff's Exhibit 63-b and c, with particular respect to—strike that.

Plaintiff's Exhibit 63-b and 63-c, which has been identified as being a balance sheet and statement of income and earned surplus for the year ending October 31, 1952, for the C. J. Dick Towing Company.

State whether or not you have examined that instrument and the copies thereof for this date.

A. I have a copy, probably, of this instrument. I had a copy with the return.

I would like to refer to my files and see if it is the same.

Q. Would you do that please?

A. Yes, sir.

(Short interval.)

The Witness: Yes, sir, I have here in my files a photostatic copy of this statement here which I used for comparison with the statement on the income tax return.

Q. (By Grundy) Did you make any analysis and comparison of those two financial statements?

A. You mean the financial statement as shown in this exhibit and the one as shown in the income tax return?

Q. Yes, sir.
A. Yes, sir, I did.

Mr. Wilson: Your Honor, I want to renew my objection again to this particular point.

I believe the statement was October 31, 1952?

Mr. Grundy: Yes, sir.

Mr. Wilson: And this income tax for the year 1952?

Mr. Grundy: It is the fiscal year ending October 31, 1952.

Mr. Wilson: As having no relationship, being immaterial and irrelevant to the assignment or transfer of the Green's Bayou stock by C. J. Dick Towing Company to United Towing Company.

The Court: Overrule the objection.

Mr. Wilson: I assume you are making the same ruling.

The Court: The same ruling.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Mr. Davis, I believe I have already asked you whether or not you made any examination or inquiry or investigation, as you qualified the term, of the ledger sheets of the C. J. Dick Towing Company for the fiscal year ended October 31, 1952, which has been previously shown to you this morning; and I believe you stated you had made such an investigation; is that correct?

A. Yes, sir; we took a trial balance of the books as reflected by the ledger examined this morning.

Q. Mr. Davis, will you state the result of this analysis and comparison of the trial balance taken from the books and the balance sheets on the income tax return there and the balance sheet of October 31, 1952, which I have just handed you?

A. You want me to note the differences, if any, between these three statements in the income tax return?

Q. If you find any difference.

A. And the trial balances on the books?

Q. If you find any differences between the statements, will you state what they are and whether or not you are able to find what the reason for those differences was?

A. Well, I have here a work sheet which was prepared under my direction which reflects differences in certain accounts between those three statements.

Now, the statement as shown on the income tax return, the statement as shown on the income tax return and the trial balance that was taken from the ledger are here substantially in agreement. There was one adjustment of approximately $21,000 between the books and the income tax return, and although we didn't ascertain definitely what there was, there was an indication that it was a statutory adjustment to account for an emergency permit that they had had for rapid depreciation for tax purposes which was not recorded on the books, and that was the only substantial difference between the books and the income tax return balance sheet.

Q. With respect to the other balance sheet, I want you to state whether or not there was a substantial difference between that balance sheet and the income tax sheet.

The Court: What is that other balance sheet?

Mr. Grundy: Previously identified as the balance sheet and financial statement given to the Second National Bank as of the same date.

The Court: All right.

The Witness: The differences that we found between the balance sheet of October 31, 1952, which was given to the Second National Bank, and the balance sheet for the books was approximately $331,714.95.

Q. (By Mr. Grundy) In that taking of this trial balance from those books of the company, were you able to locate any explanation of the various accounts which made up that 331,000-dollar difference?

A. I have analyzed the differences, and for the differences by amount as to specific accounts; but as to the reasons for the differences, I was not—none came to my attention.

Q. What are the differences by accounts, Mr. Davis?

A. Well, the accounts will fall into two groups, asset accounts and liability accounts.

We have a difference of $231,714.95 in the earned surplus account, and that is accounted for by two groups of accounts; one, the asset accounts were overstated by $43,541.66—and I say "overstated;" that means on the balance sheet presented to the bank they were overstated when compared to the balance sheet as shown on the income tax return.

Then in the other category of accounts there is an understatement of liability of $288,173.29. I can give you the individual accounts within those two.

We have an overstatement of assets of $43,000 and an understatement of liabilities of $288,000.

Q. What I want to know is what went to make up the understatement of liabilities of $288,000.

A. There was a difference in the account entitled "Accounts and Vouchers Payable," a difference of $240,013.55.

Q. Let me ask you as to that item.

Will you state what that difference—which figure was the highest figure and which figure was the lower to account for that 240,000-dollar difference?

A. Well, the accounts and vouchers payable balanced according to the books of the company as of October 31, 1952, showed a balance of $424,802, and the statement that we have reviewed, which was presented to the bank, showed a balance of $184,788.44; so as between the two statements, there was an understatement on the statement given to the bank in the amount of $240,013.55.

Q. What other accounts went to make up the total understatement of the liabilities?

A. There was an understatement of notes payable in the amount of $29,888.

There was an understatement in an account entitled "Other Liabilities" of $20,236.75.

There was an understatement in accrued interest and taxes of $17.64.

There was an overstatement of accrued wages of $1982.65.

Those are differences in the liability accounts.

In the asset accounts there was a difference in the cash account of $30,885.58.

The Court: Which is the larger?

The Witness: I was just going to explain that.

The cash account, based on the statement to the bank of cash in the bank of $8495.64 and the cash account on the books of the company showed an overdraft of $22,389.98.

Accounts receivable—

The Court: Does that mean they had no cash?

The Witness: According to the books, an overdraft of $22,389.88 and a statement to the bank of $8495.64; a difference of $30,885.58.

Q. (By Mr. Grundy) Were there any other asset accounts that contained the differences as between those statements?

A. Yes, sir.

In accounts receivable there was an overstatement of accounts receivable of $9999.59. On the statement to the bank the accounts receivable balance was shown as $123,381.40, and on the accounts receivable account in the company books there was a balance of $113,381.81.

In the material and supply account—I take it that is an inventory account—there was an overstatment or difference of $2342.06. The statement to the bank on that account showed $6979.45. The books of the company showed $4633.49.

On the account prepaid interest, there was an overstatement of $314.43. The statement to the bank showed $945.60 and the Company books, $631.17.

Those are the only account differences we found in the assets accounts.

Q. Mr. Davis, would you explain what you meant a moment ago when you said a difference of $331,000 between the financial statement attached to the income tax return and the financial statement identified as having been given to the bank as of the same date?

A. The 331,000-dollar difference was in the surplus account, earned surplus account, as shown on the statement given to the bank showing a credit balance of $169,514.82, whereas the book surplus accounts showed a deficit of $162,200.13.

Q. Was that book surplus account the same as the surplus account deficit on the income tax return?

A. It was the same, I believe, except for this emergency amortization adjustment they made for income tax purposes.

The difference of $21,011 between that surplus figure and the figure on the income tax return.

Q. Does the exhibit handed to you as Plaintiff's Exhibit 63, being a financial statement given to the Second National Bank as of October 31, 1952, contain a true and accurate statement of the financial condition of the C. J. Dick Towing Company as reflected by the ledger which you have examined?

A. I would say it does not.

Q. Mr. Davis, are you in a position to state whether or not you could give any opinion as to a solvency or insolvency of the C. J. Dick Towing Company as reflected by the statement given to the bank, Plaintiff's Exhibit No. 63?

A. You mean whether I could express an opinion as to the solvency and insolvency as of October 31, 1952, as reflected by those statements?

Mr. Wilson: I assume I have a running objection to all of this?

The Court: Yes.

The Witness: Well, to be sure I understand the term "insolvency," you mean the general accounting concept of insolvency; inability to meet obligations as they currently materialize.

The Bankruptcy Act goes a step further and defines it as liabilities in excess of assets.

Q. (By Mr. Grundy) Go further, and if you have any opinion as to either test of solvency or insolvency, will you state what that was?

A. As for the reflecting of liabilities in excess of assets, I would say as of October 31, 1952, that the books would reflect liabilities in excess of assets.

Now, as to the other test, whether they could meet their obligations as they materialized, that would be a question I don't believe I could answer.

Q. Merely from an examination of the books at that time?

A. No, sir. That would be a question of fact at that time, whether they could pay their debts.

Q. Will you state whether the test of insolvency is measured by a deficit in earned surplus accounts?

Mr. Wilson: I object. He has stated what the insolvency is under the Bankruptcy Act and under the general accounting practices, and he has said he cannot tell under the Bankruptcy Act whether it is insolvent. He is being asked a question now—

The Court: I think that objection is good.

Q. (By Mr. Grundy) Mr. Davis, will you state what the deficit in the earned surplus account of $167,000 shown on the balance sheet attached to the income tax return represents with respect to assets and liabilities?

A. It represents the net difference—let me put it this way, the earned surplus and capital stock account or the equity account of the business, and the equity account represents the excess of assets over liabilities; consequently, if there is a credit balance in the equity account, either to the credit balance and the capital stock in earned surplus, that indicates the assets exceed the liabilities.

On the other hand, if there is a deficit in the total of both accounts, that indicates the liabilities are in excess of the assets.

Q. Will you state by what amount the liabilities then of the C. J. Dick Towing Company, according to the books you examined as of October 31, 1952, exceeded those assets?

A. As of October 31, 1952?

Q. Yes, sir.

A. According to my calculations on October 31, 1952, the company's liabilities totaled $1,568,609.98.

Its assets totaled $1,386,435.60, or a net capital deficit of $182,174.38.

Q. Now, Mr. Davis, did you make any examination of the general ledger of the C. J. Dick Towing Company as of the 31st day of January, 1953?

A. I will go back and qualify the term "examination" again.

We did not make what an auditor calls an examination or audit. We made a review and listed the accounts in what we call a trial balance to take off what we call a balance sheet per the books.

Q. Will you state the total amount of assets and liabilities of the C. J. Dick Towing Company as shown by this trial balance taken from those books as of January 31, 1953?

Mr. Wilson: I object to that. As he said, it is not a complete audit, and if he is going to testify as to figures of assets and liabilities, I think his audit should be complete instead of an incomplete statement.

The Court: I think the objection is not good for the reason that the Court cannot accept his statement and his audit as absolutely correct, nor could the Court reject him. The Court has to go into them and investigate them and see whether or not they are correct before he adopts them as part of his findings.

Now, Counsel, because he doesn't make a complete inventory of the books of the company doesn't mean, I think, that what he has made here might not be helpful in reaching a conclusion in the matter.

Objection overruled.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) You may answer this question. Do you want the question read back?

A. Yes.

The Official Reporter (Reading): "Will you state the total amount of assets and liabilities of the C. J. Dick

Towing Company as shown by this trial balance taken from those books as of January 31, 1953?"

The Witness: The total liabilities per the books—I don't have a total of the liabilities themselves. I have a total of the customary credit balances which include the equity accounts as a credit balance offset by the asset account in the treasury stock account and the surplus deficit; but I can tell how much credit balance exceed the debit balance, which in substance is the surplus deficit on that date.

Q. (By Mr. Grundy) Is that surplus deficit subject to the same definition you gave a minute ago of the deficit in the capital surplus account as of the 1952 statement that I believe you testified that represented the net difference between the asset and the liability, did you not?

A. That is right. There is a net surplus deficit on that date of approximately $79,000.

Q. All right, sir. Now, did you make such a review or investigation of the general ledger of the C. J. Dick Towing Company, and did you prepare a trial balance sheet as of September 30, 1953?

Mr. Wilson: Same objection to that. It is remote, not related to any issue in this case.

The Court: Same ruling.

Mr. Wilson: Note our exception.

The Witness: Yes, I made a trial balance of the books of C. J. Dick Towing Company as of September 30, 1953.

Q. (By Mr. Grundy) Now, what did this trial balance as of September 30, 1953, show with respect to the capital surplus account?

A. There was a net capital deficit according to the books of $100,624.80.

Q. Now, did you make such a review and investigation of those same books for the date of October 31, 1953?

A. Yes, sir, I did.

Q. Did you prepare from that investigation a trial balance?

A. Yes, sir, I did, similar to the others.

Q. Will you state what the trial balance as of October 31, 1953, showed with respect to that difference between assets and liabilities?

A. On that date there was a net capital deficit of $59,717.59. October 31, 1953.

Q. May I see this a minute?

A. Yes.

Q. One other question with rsepect to Plaintiff's Exhibit 63-b, being a part of the October 31, 1952, statement which was given to the Second National Bank.

What is the amount of the net income for the fiscal year ending October 31, 1952, as shown by that statement?

A. I believe it shows a loss of $45,586.36. The reason I say, "I believe;" the figure would probably show as a red figure, but when it was photostated it showed in black; but at the foot of the column it appears as a loss of $45,000.

Q. Handing you Plaintiff's Exhibit No. 63-b, in the original form before it was photostated, I ask you whether you can answer the question a little more easily?

A. It shows a loss of $45,586.36.

Q. Will you state whether that loss is shown on the original in red ink?

A. Yes, sir, it is in red.

Mr. Grundy: Your Honor, I think at this point I would say to the Court that I discovered in the photostating process black and red portions of this do not show, and therefore I am going to withdraw my request of this morning and re-offer the original instrument with the record, because otherwise we do not believe the photostat will truly reflect the information contained thereon.

Mr. Wilson: It is quite all right.

The Court: Very well.

Q. (By Mr. Grundy) Now, what was the net income figure for the fiscal year ending October 31, 1952, as reflected on the income tax return?

A. The U. S. Corporation income tax return for the fiscal year ending 1952 shows a net income in red figures and it is described as a loss, $389,517.21.

Mr. Grundy: I believe that is all.

382 CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Davis, I don't think it too important, but I forgot to ask you; are you a CPA?

A. Yes, sir; licensed in the State of Texas.

Q. When did you first start working on those books of C. J. Dick Towing Company; examining them, so to speak?

A. I would have to look back in my office on my time records. I would approximate possibly two weeks ago.

Q. Two weeks ago?

A. I would say possibly.

Q. And it is your opinion you have made a thorough examination of all the books and papers having to do with C. J. Dick Towing Company business for the year that you have testified to?

A. No, sir, I believe not; and I believe I so stated.

I will explain the term "examination" as an accountant knows it.

Examination means a complete audit of the company books and a complete independent verification of the accounts, a reconciliation of the bank statements, physical inspection of the assets, and totaling their records; reviewing the system of internal control to determine if it is reliable, and checking many, many features that take quite a bit of time, and accountants are particular in distinguishing between examination and a review of the books.

A review of the books would be something like taking off a trial balance and reading accounts.

Q. A complete audit, as you stated, might change those figures considerably?

A. No, sir, I believe I would not state that.

Q. I am asking you; would it not?

A. You are asking me would it? I could not say that.

Q. But it is possible, is it not?

A. It is possible, yes, sir.

Q. That is what I am asking you. Now, you are not sure whether you have examined all of the books of C. J. Dick Towing Company, are you?

A. I am pretty sure I have not. I think I can—I think I confined my remarks to the general ledger.

Q. These ledger sheets you are talking about, you are not sure those compile all of the ledger sheets; am I right on that?

A. No, I am not sure.

Q. In other words, what you had to work with, you took those figures off of?

A. Yes.

Q. And if there were other sheets not in the ledger, that might vary those figures?

A. Yes, sir; but in those instances, I believe in most instances they would have had to be sheets missing with equal debits and credits, because I believe we balanced the shets the debits and credits; so if a sheet with a debit was missing, a sheet with a credit balance equal to it would have to be missing.

Q. In figuring your assets—

The Court: Would you go over that again?

The Witness: In explaining whether or not a sheet was missing, the problem or purpose of an accountant's trial balance is to see the debits and credits of a set of books are in balance, and in most instances we balanced the debits and credits in the books; so if a sheet were missing with a debit balance, a sheet with a corresponding credit balance would also have to be missing in order to make the books still balance.

That is one purpose of a trial balance, to try to insure all the sheets balance.

Q. (By Mr. Wilson) These are the general ledgers? Is that was you say?

A. Yes, sir, that is right.

The Court Was the paging in the general ledger regular?

The Witness: I beg your parodon?

The Court: Was the paging in the general ledger regular?

The Witness: They appeared to be in the general order that a general accounting set of books would be. The assets preceded the liabilities, and they were about in the general order a set of books would be.

The Court: Were they looseleaf?

The Witness: I believe it was a post binder. That is a looseleaf system, yes, sir.

Q. (By Mr. Wilson) Are the pages numbered in those?

A. I don't recall whether they are or not. I would have to look and see.

Q. You say then the only difference between a trial balance and an audit would be a verification?

A. In the amount of work to be done? Yes, sir; that is right.

Q. Do you know what the gross income of the C. J. Dick Towing Company was the fiscal year ending October 31, 1952?

A. Gross income? You mean from the receipts of towing operations, or towing operations and sale of assets?

Q. The total gross income.

A. The total gross income or, the gross receipts?

Q. I may not know all your accounting terms, but I want to know the total amount of money that was received for that fiscal year.

A. That is October 31?

Q. 1952.

A. I can give you the income amounts as shown by the books, yes, sir.

I beg your pardon. I don't have those work papers with me.

Q. Do you have those gross receipts?

A. No, sir, I don't for October 31, 1952. No, sir, I do not.

Q. I thought you gave me a figure of some form of gross income or net income. I believe you gave me, wasn't it for the fiscal year of 1952 ending October 31?

A. Yes, sir; but you asked me for gross income. I can give you the net, but not the gross without the work papers and looking at the books.

Q. You do not know what the gross income was?

A. No, sir.

Q. But you have arrived at a net income?

A. I would say I didn't necessarily arrive at it. I took it as it was reflected in the books. The books reflected a net income figure.

Q. You took it off the books—

Mr. Grundy: While Counsel has certain rights to cross-examine, I believe the record will show my only question with respect to net income here, as to the net income figure shown on the exhibit in evidence; first, the statement given to the Second National Bank on October 31, 1952, and second, the statement on the income tax return as of the same date; I simply asked him to state what those instruments recite, and I believe any cross examination as to those net income figures probably should be limited to that.

The Court: I don't think it is improper cross examination.

Go ahead.

Q. (By Mr. Wilson) You have given us a net income, Mr. Davis, and you say you cannot determine how you arrived at that net income except that you took it off the books?

A. That is right.

Q. So you don't know just what made up that net income or why that figure was on the books as set out?

A. No, I would have to review the individual accounts.

Q. You don't know whether included in that net income there are equities in equipment added to that or not, do you?

A. You say income equities and equipment?

Q. Being purchased or—

A. Let me see if I understand you.

Ordinarily equity is an asset, and generally assets would not appear in an income statement as a general rule.

Q. That would increase the income in a general statement if you say they are added to it?

A. I don't know. I wouldn't say—I am not sure I follow you.

Q. Let me get your answer. You said they would not be included in a general statement; is that right?

A. I say predicated on the fact that an equity is generally, accountingwise, considered as an asset, and to go a step further, assets do not appear on an income statement, a profit and loss statement.

Q. If there were any equities, and you said you have not discovered them, that would increase the income as set out in an income tax statement, not on the statement, but increase the income the company had that particular fiscal year?

A. I don't believe I could—

Q. Maybe I don't give it in exactly your terms, but you say they are not included in the income tax.

A. I said income tax statements. Profit and loss statements.

Q. They would not show in that?

A. Generally not.

Q. So there could be quite a bit of difference in those bank statements between the profit and loss statements on the books of the company which would show those equities?

A. I believe some of those statements given to the bank were balance sheets as well as profit and loss.

Q. There were both on there.

Take another situation there. For instance, take a situation where the company has purchased equipment under a lease rental or rental lease purchase where they set up on their income tax statements another statement, income profit and loss statements, they charge off that rental paid on this lease purchased equipment.

Now, that is not ordinarily shown on bank statements and such as that, but actually the company would be building up an equity in that equipment, whereas they are entitled by law to charge that off as an expense.

Am I right on that?

A. Under certain conditions they are allowed to charge it off for income tax purposes, but that is not a clear-cut proposition.

Q. And that would make a variance between the bank statements and the income tax statements, and also book audits as compared to the other two?

In other words, you would have three different sets of balance sheets if you were going into it that way. Am I right on that?

A. I don't—you are taking a hypothetical proposition. You could have three different balance sheets?

Q. Yes.

A. And you purchase under a lease purchase agreement and have not exercised any option?

Q. You have not exercised any option.

A. I would say accountingwise you would not be justified in showing any equity on your books because, in fact, you didn't own any.

Q. You didn't own any equity when you had made certain purchases under lease purchase agreements where you had the right to purchase the vessel?

A. No, sir. Under general accounting procedure I don't believe you would be correct in showing any equity in that.

I might be under some arrangement to footnote a balance sheet with a disclosure that you have an option to acquire, and in the event you did, you might have certain equities; but in getting into the matter of equities, you would have a question of whether or not depreciation had actually exceeded any equity you are building up.

Q. In other words, in an income financial statement to the bank that would not be shown on it, those equities?

A. I would say not. Not without certain disclosures.

Q. And not shown on any income tax statement?

A. We are dealing again with a hypothetical situation.

Q. You just said there would be no equity because general accounting—

A. We are getting into something else. Income tax is not accounting. It is statutory and they tell you how to treat those things, and your current purchase under the lease purchase arrangement, they do not always say where you can charge those off.

Q. You should have three different statements, if you want to call them that; one that would go to the bank, which would not take into account the equipment—the equities you were building up in equipment; another made out on a different form for income tax purposes, and that would be taken from the books, which would add it up differently?

A. I don't believe you could, under generally accepted accounting principles. I don't believe that you could for three, no, sir.

Q. If you are building up assets in some equipment, or equities, they would be considered assets in the event of normal liquidation, wouldn't they, or sale of that equipment?

A. In the accounting concept of statement presentation you generally have a going concern concept of a business, and as such I don't believe you would be justified in showing any assets on the books which you do not in fact own.

Q. You wouldn't be justified in showing equities in equipment?

A. We get into the term "equity," and not being an attorney,—

Q. As a matter of fact, if you paid on certain purchase contract of purchase equipment, you have an equity in it if you have a right to buy it later?

A. You may have and you may not have. It may be a depreciating and deteriorating feature.

Q. You have something there if it isn't offset by something else?

A. You have something if you exercise your option.

Q. I grant you that.

A. Accountingwise, from a financial statement as that, at the far outside all I could say was a disclosure in a

footnote to a balance sheet that that condition existed; but I could say any assets not owned on a balance sheet.

Q. In other words, a company has something there, but they shouldn't show it on the books? That is the simple way?

Mr. Grundy: I object to that as being a statement by Counsel of what the witness said.

Regardless of cross examination, he has answered that same question four times in four different ways, and each time in the negative.

The Court: Go ahead.

Q. (By Mr. Wilson) Can you give the gross income of the C. J. Dick Towing Company on October 31, 1953?

A. No, sir; I don't have that.

Q. You are in the same position on it as you are in the other one?

A. Yes.

Q. You have simply taken the net balance shown on the books of the company?

A. Yes.

Q. You have no idea how that might be arrived at because you didn't go into that portion of it?

A. How the net income—

Q. —was arrived at. You didn't check back?

A. We can by checking the general income arrived at by deducting the expenses from the receipts, but I made no specific computation.

Q. Let's take the tax returns you were talking about. Are the assets on them shown at fair market value, or net value?

A. That is a question of fact I could not answer because I have not verified what the cost value or the fair market value of them is.

Q. You couldn't determine as to the correctness of them one way or the other as to net value or fair market value?

A. No, sir.

Mr. Wilson: I believe that is all.

The Court: Any further questions?

Mr. Grundy: Yes, sir.

The Court: May I take a recess first?

Mr. Grundy: I think that will be just as well.

The Court: Recess for 10 minutes.

(Short recess.)

394 REDIRECT EXAMINATION

Q. (By Mr. Grundy) You were asked a moment ago by Mr. Wilson whether or not you had made any audit, and if an audit would make a difference in your investigation or review of that general ledger.

I would like to ask you this question: if the entries in the general ledger which you examined were correct entries based on the original information given to the person making the entries, then would an audit or a detailed examination make any difference in the balance sheet which you took off of that book?

graph on that first page of that assignment I am pointing to, beginning with "The undersigned —."

A. "The undersigned warrants that in his (its) own right, he (it) has full and unencumbered title to each of said accounts receivable, that the said assigned accounts receivable are just and due for goods, wares and merchandise sold, shipped or delivered to the respective debtors; that the amounts thereof are correct as set forth on said schedule; and all just and lawful credits, offsets, and counterclaims thereof have been allowed —" (witness completed the reading of this paragraph on Plaintiff's Exhibit No. 15.)

Q. All right, Mr. Daniels; thank you.

Now, Mr. Daniels, was the statement that the said assigned accounts receivable, being the invoices to Neilson for $15,000; was the statement that that assigned account receivable was just and due for goods, wares, and merchandise sold and shipped or delivered, a true statement?

A. As far as I know, it was perfectly true.

Q. Where did you get your information?

A. I just stated that Mr. Jones handed me the loading figures and I presumed he had negotiated a contract with Neilson. We had handled other contracts with Neilson before, and I had no presumption on my part there was anything wrong with it.

Q. Mr. Jones told you the Casteel loaded 3000 tons of oil in barges 20C100 and 20C300 to be towed by the Chili Simpson?

A. Yes.

Q. And that was the movement for the account of Neilson Barge Lines?

A. True.

Q. And he told you to make up an invoice?

A. Yes.

Q. Did he tell you to go over and borrow the money at the bank?

A. Yes.

Q. As a matter of fact, the Chili Simpson was not near Deer Park that day?

A. No, but someone may have towed it over to another point for the Chili Simpson to pick up. It has happened many times.

Q. And you did take that note to the bank, as we have gone into before, took the invoice over, signed the note, and got the money, and it went into the company's account?

A. In good faith.

Q. Let's look for a moment at Plaintiff's Exhibit No. 12, being the invoice to Jack Neilson, Incorporated, being November 5, 1953, in the amount of $7200. Do you recall that invoice?

A. Yes, sir.

Q. And that invoice recites that the cargo was to be moved from Louisiana to Kentucky for the account of Jack Neilson under the date of November 3, 1953?

A. Correct.

Q. To be towed by the M. V. Chili Simpson?

A. Yes, sir.

Q. Is that the same as the Chili Simpson?

A. Yes.

Q. On the 5th the Simpson was to tow these barges to Island, Kentucky, according to this information?

A. Yes.

Q. And on the 9th the same boat was to tow two other barges from Deer Park, Texas, to Wood River, Illinois, according to your information?

A. Yes.

Q. Didn't it strike you as strange the invoices should recite four days apart the same boat should be towing this?

A. Not a bit. The practice had gone on for years as I have tried to outline; and let me try again: large river equipment, such as the Chili Simpson and the Casteel, did not have an assigned number of barges which it moved as a unit year in and year out; or, rather, month in and month out; because on the river, on the Mississippi River, the Ohio River and its tributaries, often those are gathered, just as boxcars are gathered for a train, at various loading points. They may have been towed there by three different boats to some focal point on the river, at which time it may have been a day, two days, or a week before the motor vessel Chili Simpson would have come down with its empty barges, one or ten. They may have been towing four or five and dropped the empty barges and picked up whatever loads are available; because a big boat like that, to go and load at each particular point, the cost while that boat is standing by loading one barge is prohibitive as compared to some smaller boat who can handle one only while that barge is being loaded and subsequently towed to some focal point; but the whole purpose — it was always the policy of the company to put the name of our vessel, our vessel who would subsequently receive all the revenue which would flow first to the boat, and the invoices and charges from the towing companies would be charged against the boat, thus reflecting some net credit for a given period of time for a stated purpose.

Q. What kind of barge was the M-40?

A. I couldn't tell you.

Q. You described on your invoice to Neilson on November 5, 1953. As a matter of fact, that was a hopper barge, was it not?

A. I couldn't tell you.

Q. It wasn't a C. J. Dick Company barge?

A. No. We had a number of leased barges, a greater number in the last four or five months where I was confined to the office that I never saw.

Q. I show you Plaintiff's Exhibit No. 11, which is the same printed form you just read from a moment ago. In that exhibit you also — the form also states that the assigned accounts receivable are just and due for goods, wares, and merchandise sold, shipped, and delivered to the respective debtors?

Mr. Wilson: Your Honor, I assume I have my running objection to this whole period of time and these questions?

The Court: Yes.

Q. (By Mr. Grundy) When you took that invoice over on November 5th to borrow 5000-some-odd dollars that you borrowed, you didn't tell the bank the work hadn't been done?

A. I didn't know it had not been done.

Q. The subsequent facts proved that hadn't been done?

A. I found out myself it hadn't.

Q. How?

A. Through Mr. Jones.

Q. He told you?

A. He told me, and subsequently we received invoices from Jack Neilson offsetting the charges we had sent him, for what purpose I did not know.

Q. You really didn't know much about it?

A. No, sir. I have explained my duties for the last four or five months was confined wholly to the office. The bookkeeping duties I had to assume when our bookkeeper left in May or June of 1953.

I confined myself to talking to the creditors, which included people like Mr. Hinton, who just testified here, to the actual mechanical details, typing up invoices, typing up checks, preparing payrolls. Those things occupied a good 10 or 12 hours a day that I spent down there in that office.

Q. Why did you have to do all this bookkeeping and somewhat menial office work? Didn't you have a bookkeeper or typist in the office?

A. No. He left in July of 1953 because he informed us he wanted a raise and could obtain a better position. We did not feel we wanted to match the increase in the offer, and frankly, to conserve money, Mr. Jones and Mr. Castœl asked me if I would mind doing the work myself.

Well, I minded, but nevertheless it was an economic situation and there was no one to do the work.

Q. So you really had to put in all the time you could spare on C. J. Dick Company affairs?

A. Yes.

Q. You ran the office, made up invoices, signed notes and the checks?

A. Yes.

Q. All that was done at the order of Mr. Jones, the president?

A. There isn't much order to making up payrolls. You either pay or the men walk off the boats.

All the contracts were in Mr. Jones' province, who either on the telephone or teletype on those spot lists, which we call a listing, like this is a spot listing, and he would obtain the loading information because he would either talk to the ports who had the manifest or he would talk to the people in the traffic department in the companies and furnish me with those loading figures which served as the basis for making up those invoices.

Q. Mr. Daniels, where did you get your education?

A. I first attended Texas A&M in 1940-1942, and I went in the service, was discharged for a heart condition, and entered the University of Texas in 1945 and came out in 1947 and went back to work with J. Phillips Sheffield Company, a firm of certified public accountants.

Q. And right in the same year you went from Phillips to the C. J. Dick Company?

A. On January 1st, 1948, to C. J. Dick Towing Company.

Q. And that was the only business you worked in, except for the few months with Sheffield, until the company went into bankruptcy?

A. Yes.

Q. How old are you?

A. 32.

Q. So in November of 1953 you would have been 30?

A. Yes.

Q. As a matter of fact, Mr. Jones actually ran the United Towing Company, the C. J. Dick Towing Company, and John D. Jones, Incorporated?

A. He was the provincial head, and as being the head of the company, it would naturally fall in his right to discuss with third parties potential contracts, financial matters, and conditions of that sort.

I follow up, because of my accounting background and training, the mechanical detail. I did it myself, and one of the bookkeepers previously employed by me did it.

Q. As a matter of fact, with respect to the notes and the invoices and borrowing from the bank, making up statements, Mr. Jones told you what he thought should be done and what he wanted done, and you went ahead and did it?

A. We knew from the standpoint of borrowing money, we knew from what was previously outlined, that Dick was in need of cash. We were putting all the invoices we could at the bank. We made numerous invoices to people like the Mississippi Towing Company, but that would be $415, and we had one with Southern Alkali for $500. They were weekly type things. They weren't large enough to pledge at the bank, so we just sent the invoices out and they were subsequently paid in due time; but any large sum, I, through the mechanical aspects of it, obtained information from Mr. Jones, prepared invoices, took it to the bank, because it was in the course of my duties.

I think you will find all those notes are signed in my name because I prepared them, and being secretary and treasurer, it was more or less my duty to sign the obligation of the company.

Q. I want to ask you about this invoice assigned to the bank, being Plaintiff's Exhibit No. 19, the 5095-dollar invoice to Jack Neilson, Incorporated. The invoice in the sum of $6369.02.

You have already identified that instrument, and that contains the same printed form with respect to the statement by C. J. Dick Towing Company that the account is just and due for goods, wares, and merchandise shipped and delivered to debtor?

A. Yes.

Q. Where did you get the information with which you made up that invoice?

A. From Mr. Jones. The way he received it was either over the telephone or the teletype.

Q. If you weren't present, all you can say is where you got the information?

A. Yes.

Q. You got it from Mr. Jones, and all he told you was to make up the invoice and take it to the bank?

A. That is right.

Q. There is one more item I am looking at, Plaintiff's Exhibit No. 7, another printed form, assignment of accounts receivable, and it covers the invoice to the Port Arthur Towing Company of September 14, 1953, in the amount of $18,100.

A. Yes.

Q. That contains the same statement, assigned accounts receivable are just and due for goods, wares, and merchandise sold, shipped, or delivered to the respective debtors?

A. That is correct.

Q. Where did you get the information through which you made up this 18,000-dollar invoice? The same place?

A. The same place.

Q. Mr. Jones.

And Mr. Jones told you to make up the invoice, pledge it to the bank, and you did do so?

A. Yes.

Q. And the company got the money?

A. Yes.

Q. Mr. Daniels, you have testified at some length about the two items that were liabilities on the Green's Bayou books, the note payable to C. J. Dick Towing Company for $15,000, and the account payable for $22,000.

Those were transferred on October 1, 1953, pursuant to an earlier agreement?

A. That is correct.

Q. Although your testimony was that had the Green's Bayou property been sold at the time of the transfer; I believe your testimony was, if I remember, that had

the Green's Bayou real property been sold October 1, 1953, the purchaser would have had to pay those two debts?

A. The purchaser?

Q. Of the Green's Bayou property.

A. No.

Q. The Green's Bayou would have had to pay them?

A. Yes.

Q. As a matter of fact, United Towing Company and Green's Bayou Marine Service Company didn't sell that property, and United Towing Company still owns the Green's Bayou stock and the Green's Bayou still owns the property?

A. That is correct.

Q. And it is in evidence on May 1st, 1953, the property has been leased at $900 a month?

A. Correct.

Q. And that money has been paid to Green's Bayou, the lessee?

A. Yes.

Q. So doing a little rough arithmetic, in the last two and a half years, approximately twenty-eight or thirty thousand dollars has been collected from that lease?

A. Whatever nine times the number of months would be.

Q. Did Green's Bayou pay out of those sums the note and account of United Towing Company?

A. No, sir.

Q. Mr. Daniels, when Mr. Hinton came out to see you from the Dun & Bradstreet organization, you had a pretty good idea of why he wanted the information, didn't you?

A. He came periodically for credit reports on Dick, which I always cooperated to the fullest extent, brought the books in, laid them down and let him examine them.

Q. There was nothing unusual about Dun & Bradstreet calling on any company to get financial information?

A. It didn't appear to me to be unusual.

Q. When he asked you in February of 1953 whether or not the information about the Green's Bayou Marine Service Company being a wholly-owned subsidiary was still correct, you didn't tell him anything about this binding contract of January to transfer your stock?

A. I saw no reason to. It neither discredited or credited Dick's financial condition.

Q. But you have plead the contract became a binding contract on February the 6th of 1953?

A. Not being a lawyer, I wouldn't know; but they tell me it was.

Q. As an officer of the company you considered the transaction would have to be carried out?

A. Yes.

Q. But you told Dun & Bradstreet for credit purposes, for the purpose of their investigation, that C. J. Dick Towing Company still owned the capital stock?

A. They still did. It was a matter of record.

Q. But you didn't say anything about any obligation of transfer?

A. I saw no reason to.

Q. When he telephoned on April 8th to ask about this lease Green's Bayou had entered into, you didn't say anything to him then about this binding contract to transfer that stock?

A. No, sir, because that particular conversation was with reference to leasing the property; Green's Bayou being a separate entity, it collected its own rents.

Q. When you talked to him on August 27, 1953, when he came out there and asked you again about Green's

Bayou, that was the third time within a period of six months, you still didn't tell him anything about this contract?

A. I didn't consider it important with relation to Dick's financial condition.

As a matter of fact, it would have been better to wipe it off Dick's books because it was a 48,000-dollar assets on Dick's books and their financial statements, but there was a contracredit or liability of $82,000.

Q. You mean the 48,000-dollar asset with respect to the investment account and gain or loss?

A. No. No gain or loss, because no gain or loss is recorded until the property is transferred as a book record.

Q. You carried that as an investment value, as Green's Bayou?

A. Notes and accounts receivable and accrued interest and items went into which was subsequent to '50, because it had not accrued any interest until October.

Q. When you made the transfer of stock, this books entry showed you gave credit to the investment account of capital stock of $10,000?

A. Right.

Q. And you gave credit to those other things, it would be a credit of their assets of $32,000?

A. Yes.

Q. And about a 2000-dollar credit of accrued interest which could be carried as an asset?

A. Correct.

Q. And the difference of $31,000 you showed as a capital gain?

A. Correct.

Q. So that after the stock itself, Mr. Daniels, and I am not talking about actual net or interest, but as to the Green's Bayou Marine Service Company stock, when trans-

fer was made on October 1, you gave that stock credit value of a total of $41,000, didn't you?

A. Stock?

Q. The stock and the capital gain, you gave a value to the stock of $41,000?

A. I don't think in accounting treminology you can call that a credit. The stock was wiped out as $10,000 on the books.

The gain is the difference, which I think we have earned, and agreed upon as the difference between what you receive from something and what your basis is.

Q. Your basis was $10,000?

A. Plus notes and accounts receivable.

Q. And the gain was $31,000?

A. It had to be.

Q. Would that represent a portion of the value of the stock as of that date?

A. In essence it does, yes.

Q. It would, wouldn't it; so my question was as to the stock itself which was transferred on that date, the books showed they considered the investment account of $10,000 and capital gain account of $31,000; taken together, made up the valuation given in that book transfer to that capital stock on October 1, 1953?

A. Yes, it would.

Q. When Mr. Hinton talked to you in August of 1953, about the barges MS 8, 9, 10, and 11, you told him, according to his statement at this time, that the corporation, meaning the C. J. Dick Towing Company, had exercised its option to purchase those barges and had now actual title, and it had a value of $200,000, and owed thirty-five or forty thousand dollars on the equipment?

A. On each barge.

Q. Thirty-five to forty on each barge?

A. On each barge. There was a note recorded down in the Federal Customhouse.

Q. What was the value of each barge?

A. $45,000.

Q. And you owed thirty-five to forty on each one?

A. That is right.

Q. When did C. J. Dick Towing Company exercise its option to purchase those?

A. Offhand, I don't know. Some time in 1953.

Q. Some time prior to the time you told him that?

A. Yes.

Q. As a matter of fact, those barges were repossessed and taken back by the Simpson Oil Company under the lease purchase agreement?

A. No.

Q. How were they acquired?

A. That is a legal maneuver I never understood, but there were mortgages registered showing C. J. Dick Towing Company as owner, and how they came in possession — I suppose through the foreclosure route, but it wasn't through the lease purchase agreement.

The Court: We will take a 10-minute recess.

(Short recess.)

The Court: You may proceed.

Q. (By Mr. Grundy) Mr. Daniels, after January of 1953, what was the position of United Towing Company?

A. Well, they were inactive from the standpoint of towing operations. We were attempting to make brokerage agreements in the name of United, very few of which materialized. We had hoped to be able to get some cash monies back and buy new modern up-to-date equipment so we could go back in the business.

Q. Mr. Daniels, you were testifying yesterday about

Mr. Carl G. Stearns, of the firm of Fulbright, Crooker, Freeman & Bates, and I believe you had stated he had been at one time on the Board of Directors?

A. Yes, when Captain Dick organized the corporation, it is my understanding that the bank had requested Mr. Stearns be on the Board of Directors of the C. J. Dick Towing Company.

Q. Those Minutes of January 28, 1952, bear your signature, don't they?

A. Yes, sir.

Q. The Minutes of the C. J. Dick Towing Company reflect that Mr. Stearns resigned as of that date as a director, don't they?

A. Yes, here it is. He had resigned.

The Court: What date is that?

Mr. Grundy: January 28, 1952, and he had so resigned as a director about that time?

The Witness: Yes; he did request to be relieved of any further duties in connection with the C. J. Dick Towing Company.

Q. (By Mr. Grundy) After he resigned as a director, I believe the law firm of Fulbright, Crooker, Freeman, Bates & Jaworski did continue to do legal work for your company up through December of 1953?

A. Yes, on a retainer basis.

Q. Concerning itself with admiralty business and various legal questions regarding the movement of the boats?

A. Yes.

Q. You did not consult Mr. Stearns about various lending and stock transactions?

A. Yes.

Q. And as to those matters you were advised by Mr. Casteel, though?

A. In the main.

Q. Do you mean you had legal advice by some other counsel as well?

A. No.

Q. What legal advice you did get in November and December of 1952, and throughout the year of 1953 about this corporate transaction between the C. J. Dick Towing Company and the United Towing Company you got from Mr. Casteel?

A. Correct, with one exception. Mr. Jones did talk to Mr. Sweeney Doehring with regard to the creation of John D. Jones, Incorporated. Primarily he asked would it be possible for Dick to buy and sell oil. We had this tentative contract with United States Steel that we had to buy oil, move it, and pull it to United States Steel at one figure.

Q. That was in 1952, was it?

A. Yes, sir, I believe it was.

Q. Just a couple of questions.

I want to ask you two or three things about schedules of unrecorded equities that you prepared after examining the books in the C. J. Dick Towing Company.

Turning first to Defendant's Exhibit No. 14, which is the unrecorded equities as of December 1, 1952, you showed a total thereon of 317,000-some-odd dollars?

A. Yes.

Q. But included in that you have the Casteel and the Chili Simpson?

A. That is correct.

Q. When you testified yesterday that this schedule had been prepared based on actual sales of the equipment of the company, you didn't mean to include in your testimony—

A. Well,—

Q. Let me finish.

—you didn't mean to include the Casteel and the Chili Simpson, that the valuations were based on sales?

A. I did state those items marked with asterisks.

Q. But the testimony was not clear and I simply wanted to define clearly you did not include the Casteel and the Chili Simpson on a basis of sales.

A. That is correct.

Q. And as a fact, the C. J. Dick Towing Company never sold those boats?

A. No.

Q. It lost them through some process for failure to make the payments on them?

A. Correct.

Q. Of course, the same information applies with respect to the statement of unrecorded equities as of October 31, 1953, where you have the Casteel and the Chili Simpson, and you stated yesterday that those were not actual sales. Those were not based on sales of those boats because you never had sold them?

A. No.

Q. You couldn't have unless you arranged to pay off the lessor under the agreement?

A. Yes; and I think I stated yesterday in my opinion the market was strong enough at that time that I felt, once again my opinion, that we could have recovered our paid-in equities in the vessels because they were of late, modern-type equipment.

Q. Well, on October 31, 1953, you were at that point primarily concerned with running the office and doing those other tasks you testified about this morning?

A. Yes.

Q. And the question of what the market consisted of and whether the boats could or could not be sold was largely in Mr. Jones' discretion?

A. Whether they should be sold or not?

Q. Whether they could be sold or not for a certain amount of money.

A. Of course, that is general information. Whether they should or should not be sold would be, certainly, in my understanding, that all of the officers would be in accord, whether the company was to dispose of a particular piece of equipment.

Q. Let me understand one other thing. With respect to those so-called unrecorded equities in Defendant's Exhibits 14 and 15, you would not include those equities in those assets in your balance sheets at any time, would you?

A. That is correct, because good accounting practice does not dictate when you prepare a financial statement you reach out and pick some fair market value. They are treated more conservatively.

Q. It wouldn't have been proper to include those equities in a balance sheet for a purpose of showing assets of a company?

A. That is my interpretation.

Q. And you did not so include them?

A. That is true.

Q. On this Plaintiff's Exhibit 59, being the statement of financial condition to the Treasury Department dated July 31, 1952, you list under your statement of assets and liabilities of the company as of that date, your total assets $864,357.19; is that right?

A. Yes.

Q. And what is the forced sale value you place on those?

A. $607,000.

Q. Would you say that that ratio of 600,000 to 864,000

was a fair estimate at the time of what all of this equipment would have brought if it had been sold at forced sale?

A. At forced sale I think that is fair.

Q. And you know from your knowledge of the towing business that any time you have to sell something like a towboat or a barge at a forced sale, if you can get three-fourths or a half of the value, you will be doing well?

A. Yes.

Q. So that would be a fair estimate at any time of a forced sale of this floating equipment?

A. Yes, sir.

Q. One other question: the certificate of capital stock of Green's Bayou Marine Service Company, being certificate No. 4, which was the one that was, as I understood you to say, surrendered and canceled, this being Defendant's Exhibit No. 11, you testified that that was the certificate for the 1000 shares pledged by C. J. Dick Towing Company to United Towing Company in December of 1952?

A. Yes, sir.

Q. Why is that certificate No. 4? What happened to 1, 2, and 3?

A. One, 2, and 3 were the qualifying certificates at the date of incorporation to Captain Dick's wife, one share to her, one share to Carl Stearns, and 997 shares to C. J. Dick, Trustee; and then on the date after the mortgage payments had been made, the three certificates were canceled and one issued to C. J. Dick Towing Company.

Mr. Grundy: I believe that is all.

The Court: Counsel, you had the witness and you finished with him and passed him to the defendant, and he

examined him and passed him back to you. Are you through with him now?

Mr. Wilson: I had a few questions brought out.

The Court: I was talking to the plaintiff.

Mr. Grundy: I am through with the examination of this witness unless, subject to whatever rights we may have with respect to rebuttal later on in the case.

The Court: Do you want to ask him some?

Mr. Wilson: Yes, sir.

341 RECROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Daniels, Mr. Grundy has asked you about the rental of the Green's Bayou Company property, I believe it started in April of 1953, and the amount was $900 a month that Green's Bayou received from that?

A. Yes.

Q. Will you tell us what that money was used for?

A. Primarily to pay off encumbrances on the yard, taxes, and other operating expenses incident to the maintenance of that property.

Mr. Grundy:: I am going to object to the question on the ground that the best evidence of what was done with the money by the Green's Bayou Marine Service Company would be the books and records and evidence of payment of those various items.

The Court: It seems to me, Counsel, if he knows of his own knowledge, it would be admissible, notwithstanding the books are, too. The objection is overruled.

Q. (By Mr. Wilson) Would you clear up a situation I didn't quite understand you, Mr. Daniels? Did you say that the $20,000, or approximately 20,000-dollar indebtedness due by Green's Bayou to E. B. Zinnecker was a registered recorded mortgage?

A. Yes, it is.

Q. The $7000 was just a note?

A. Was a note; and he requested us, the Green's Bayou Marine Service Company, to first pay the $7000, and to subordinate the payments on the mortgage note until the $7000 was first paid off, which happened.

Q. So the $20,000 was a recorded encumbrance on the property?

A. That is true. A mortgage on the property.

Q. Mr. Grundy also asked you as to whether or why the Green's Bayou Marine Service Company stock was still shown down to October 1, 1953, as belonging to C. J. Dick Towing Company. I believe it is referred to in those Dun & Bradstreet reports?

A. That is a matter of record. There would be no reason and would defeat our primary conference with my tax consultant to show that transfer or that disposition of the assets of the C. J. Dick Towing Company represented by the stock it owned in the company until that date, October 1, 1953.

Q. Until the stock was actually surrendered for transfer?

A. So that any time prior to that date it remained on Dick's books as a matter of record.

Q. Quite a few questions have been asked you about some pledged invoices to the Second National Bank, and I believe you stated yesterday that that was the customary way that tow contracts or lift contracts were handled by C. J. Dick Towing Company, that you would make

up those invoices on the instructions from Mr. Jones and take them over to the bank and pledge them for loans.

Answer this question, if you can: were those invoices ever paid by the customers before the tows were completed?

A. Quite frequently. Let me clear a matter here which I think has been left in the air.

From the very inception of this company's incorporation in 1947, it was the policy of the company with respect to the Second National Bank to finance—I use the term as it implies—its invoices because of the very inherent nature of the business, that the company needed the money at the minute it had the knowledge and the wherewithal to form an invoice to the debtor corporation or the shipper, because Captain Dick at the very inception had explained to the bank that they were protected, insurance carried on the cargo, so their cargo, if it was lost, the freight was earned, whether it was ever delivered or not insofar as any act beyond the negligence of the company. Many times during the course of this company, at the time I was involved in the company or even as an employee and office manager, there had been tows loaded for a company. Let's use the name of The Texas Company.

Say the lifting was made from Port Arthur to Mt. Vernon, Indiana, and those invoices were prepared, they were mailed to The Texas Company, and in many cases, paid before that tow was ever delivered.

Further, there were many instances in which a similar-type situation would arise, and because of ice conditions, because of bad fog, or because of some act of God, it was physically impossible to reach the destination.

In the meantime the company had already invoiced The Texas Company, under the hypothetical situation, and the invoice had been paid by the company, but the cargo was never delivered to its ultimate destination; therefore, Dixie Towing Company did not actually earn all of the revenue; but the thing I want to bring out is that at the time the invoice was made, the intent to deliver the specific performance was valid. There were many, many factors which I could enumerate and take a great length of time discussing acts of God, fog, and the inherent nature of the cargo, why there could be only a partial performance or no performance, or in those cases where there were redesignated to some lesser point, we would not earn all those monies.

The towing company would have to re-invoice and remit the difference between the amount collected, predicated on the greater distance, and the amount on the lesser distance, plus having to pay the note off to the bank.

Q. And those situations did develop quite often, I believe you said?

A. That happened the whole time I was with the company.

Q. So you might find a situation, as you testified, where an invoice was pledged to a bank and money borrowed, and for some particular reasons, act of God, or something, you didn't make the tow or the lift, and you would have to go back and pay the note at the bank, or if the tow didn't go its full distance, you would have to re-invoice the customer and remit the proportionate part back to the customer?

A. Plus paying the bank back.

Q. Did you have any objections from the customers?

A. We never had any objection.

Q. Mr. Grundy has asked you much about a transaction. I didn't quite get it.

In January, 1952, with reference to sale of boats and equipment by C. J. Dick Towing Company, which I believe you stated had been in the making or in discussion in December of 1952, which was why you knew Dick would be able to pay some of the money back?

A. That is correct.

Q. Now, that sale was of numerous items of equipment, I believe you called it a package unit?

A. That is the agreement we had with the purchaser. That was for a demand of "X" number of barges and a boat for use in South America.

Q. C. J. Dick Towing Company handled the whole sale, but other companies' boat units were in there. I believe you said one 30,000-dollar barge by United?

A. I would have preferred to have those sales and had separate instruments recording those sales for each one of the companies that owned the vessels. They insisted on a package deal. They wanted to work through one person. Dick acted and collected and sold that barge for United and paid United the gross proceeds for its barge.

Q. You said the sales Dick made on the package unit in February of 1953 totaled something over $200,000?

A. Yes.

Q. And at that time Dick could have paid United its money back, but it would have left Dick in the same position before the borrowing of the $88,000?

A. Yes.

Q. I have got that straight now?

A. Yes.

Mr. Wilson: I believe that is all.

347 REDIRECT EXAMINATION

Q. (By Mr. Grundy) Mr. Daniels, those transactions about which you have just testified in which you did make up an invoice, borrowed the money at the bank, and sent out the invoice, even though the work had not yet been done; and then, as you say on many occasions, for one reason or another, you didn't do the work or do all the work called for by the invoice when you had to make refunds to the debtor on that particular invoice for the money you might have collected from them, and you had to take up those notes at the bank, you would make proper entries in the books and records of the C. J. Dick Towing Company to show the disposition of those matters?

A. Surely.

First you would have to reduce the gross revenue.

Second, for refund on demand from the shipper, the amount he paid in excess of what was actually earned; and third, pay the note to the bank.

Q. And you did make entries in the books which would reflect those transactions?

A. Yes, sir.

Mr. Grundy: No further questions.

348 MARY ALICE DIONNE,

a witness called on behalf of plaintiff herein, having been first duly sworn on oath, testified as follows:

348 DIRECT EXAMINATION

Q. (By Mr. Grundy) Will you state your name, please?

A. Mary Alice Dionne.

Q. By whom are you employed?
A. The Second National Bank.
Q. I will ask you to keep your voice up.

The Court: How do you spell your name?

The Witness: D-i-o-n-n-e.

The Court: Any kin to Jack Dionne?

The Witness: Yes, sir, half-sister.

Q. (By Mr. Grundy) You are the personal secretary of Mr. H. M. Seydler? Vice-president of the bank?
A. Yes, sir.
Q. How long have you been his secretary?
A. Fifteen years.
Q. Are you personally acquainted with Mr. John D. Jones, president of the C. D. Dick Towing Company?
A. Yes, I am.
Q. Do you see him here in the courtroom?
A. Yes.
Q. Sitting next to Mr. Wilson?
A. Yes.
Q. And you are personally acquainted with Mr. Holt P. Daniels, secretary-treasurer of that company?
A. Yes, sir.
Q. Sitting behind Mr. Jones?
A. Yes, sir.
Q. Miss Dionne, will you state whether or not the Second National Bank received from the C. J. Dick Towing Company a financial statement as of October 31, 1952?
A. Yes, we did.
Q. Do you have that statement?

A. Yes, it is in the file.

Q. Would you produce it, please, ma'am?

Now, Miss Dionne, how did the statement come in to the bank?

A. It came in by mail or with a covering letter. Either by mail or messenger with a C. J. Dick Towing Company letter of February the 6th, 1953, signed by Holt P. Daniels, Jr., secretary and treasurer. It is manually signed by him, by his secretary.

Q. You know Mr. Holt P. Daniels' signature?

A. Yes. This is not his signature.

Q. Miss Dionne, did you say you had been Mr. Seydler's secretary for 15 years?

A. Yes.

Q. This little mark under there you interpret to mean someone signed for Mr. Daniels?

A. Yes.

Q. Was that received through the mail by the bank?

A. Yes, sir.

Q. And did that letter contain the statement of October 31, 1952?

A. Yes, sir.

Q. Has that statement been in the file of the Second National Bank with respect to the C. J. Dick Towing Company since that time?

A. Yes, sir.

Q. I believe I asked a day or so ago that a copy be removed and sent over here to the courtroom.

A. Yes, sir.

Q. Will you state whether or not I returned that copy to you?

A. Yes, sir, it has been returned and I placed it in the file.

Mr. Grundy: We are going to offer as Plaintiff's Exhibit No. 63 the letter of February 6, 1953, of the C. J. Dick Towing Company, and the copy of the financial statement attached thereto as of October 31, 1952, for the purpose of establishing the fact that those defendants had an actual intent to hinder, delay, or defraud their creditors.

We propose to show by expert testimony this was a false financial statement in a substantial amount of money.

Mr. Wilson: I have no objection to the financial statement, Your Honor, if it was actually given to the bank.

The Court: I imagine you can verify that.

Mr. Wilson: Yes, sir.

I think the only objection I would have as to its showing a complete total actual value, fair market value, of all of Dick's assets. It may show all of what its liabilities, but financial statements, as testified by Mr. Daniels before, are made up on a depreciated value.

The Court: It looks like your objection would go more to admissibility—to weight than to admissibility.

Mr. Grundy: May we have the reporter make photostatic copies of those two documents, of the one exhibit, so the bank's originals may be returned to the file, of the letter and statement of October 31, 1952?

Mr. Wilson: No objection.

(Thereupon the documents referred to above were marked for identification by the reporter as Plaintiff's Exhibits Nos. 63-a, b, and c, inclusive.)

Q. (By Mr. Grundy) Miss Dionne, will you state whether or not the Second National Bank received from the C. J. Dick Towing Company a financial statement and balance sheet as of October 31, 1953?

A. Yes, we did.

Q. Do you have a copy of that statement?

A. Yes.

Q. Miss Dionne, you have turned to a statement in the file as of October 31, 1953. There appear to be five pages of that statement. Is that right?

A. There are more than that. That is attached to some other exhibits.

Q. Hold your voice up a little, please, ma'am.

A. Actually along with that statement there are seven pages, including the financial statement as of October 31, 1953, and mortgages of record as of November 30th and various other schedules.

Q. Were all those various pages brought in as one instrument and brought in together?

A. They were.

Q. How did they get to the bank?

A. Those were delivered to us by Mr. Jones and Mr. Daniels.

Q. Approximately as of what date?

A. Within a week between December 21 and December 30th,

Q. Of what year?

A. 1953.

Q. And did you place those statements in the bank's C. J. Dick Towing Company file?

A. Yes, sir.

Q. Have they remained there until this time?

A. Yes, sir.

(Thereupon the documents above referred to were marked for identification by the reporter as Plaintiff's Exhibits Nos. 64-a through 64-g, inclusive.)

Mr. Wilson: I assume these last two offered exhibits, Plaintiff's Exhibit 64-a and 64-b, c. d, e, f, and g, purport to show the financial condition of the C. J. Dick Towing Company as of November 30th, 1953, and October 31, 1953, and assuming Counsel shows that they were sent to the bank by the C. J. Dick Towing Company or its officers, I want to make my objection to them as being too remote, the same objection I have been making all along here, in point of time to have any connection with the transaction of December of 1952 and January and February of 1953.

The Court: The same ruling.

Mr. Wilson: Note our exception.

Mr. Grundy: To make the record perfectly clear, that exhibit, those seven pages, that exhibit is offered for the purpose of showing th[e] that financial statement was given to the bank by C. J. Dick Towing Company as a statement of its financial condition as of the date shown.

May we have the same agreement with respect to photostating and substituting a photostat copy in the record?

Mr. Wilson: Yes, you certainly may.

Q. (By Mr. Grundy) Miss Dionne, during the month of December, 1953, did you have any conversation, or were you present at any conversations between Mr. Seydler and Mr. Jones and Mr. Daniels?

A. Yes, sir.

Q. Were you present at a conversation approximately December 21, 1953, between Mr. Seydler and Mr. Jones and Mr. Daniels?

A. Yes, sir.

Q. Miss Dionne, were you familiar with a transaction by which the C. J. Dick Towing Company borrowed money from the bank upon a note and assignment of an account receivable—upon two notes and two assignments of accounts receivable—to the Jack Neilson and Neilson Barge Lines in Louisiana in the month of November, 1953?

A. Yes, sir.

Q. Will you state what was said at this conversation between Mr. Seydler, Mr. Jones, and Mr. Daniels, with respect to those two notes and invoices?

Mr. Wilson: I will object to that. Mr. Seydler is not in court and it would be hearsay. The bank is not a party to the lawsuit and any statement that the bank might have made over there testified to by a second witness, I believe is inadmissible and too remote in this case.

The Court: As I understand, you propose to offer what the Dick people said?

Mr. Grundy: And what Mr. Seydler said in the presence of the Dick people.

The Court: The Court will let her answer the question. You may make your objection and I will rule later. Some might be admissible and some not.

Mr. Grundy: You may answer the question.

The Court: In order to give me the picture, who was present at that conversation?

The Witness: Mr. Jones, Mr. Daniels, and Mr. Seydler, and I was taking notes.

Mr. Wilson: I think again, Your Honor, I want to make this objection; that it should be directed as to what any particular party said and not what was said, what Mr. Jones said, if you want to make that, or what Mr. Daniels said, or what Mr. Seydler said; and, of course, my objection to the over-all testimony which the Court will rule on later.

The Court: It seems to me in this conversation what he said would be admissible; so I overrule that part.

Mr. Wilson: I want to make the further objection that the stenographic notes would be the best evidence of what was said, not by memory on it.

The Court: It is not a legal document, the notes. The objection is overruled.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Miss Dionne, one question before you answer that last one: you stated a moment ago you took notes on the conversation; did you thereafter prepare a memorandum from those notes?

A. Yes, sir.

Q. And do you have that memorandum before you now?

A. Yes, sir.

Q. And have you looked at that memorandum for the purpose of refreshing your recollection before testifying in this case?

A. Yes, I have.

Q. Now, Miss Dionne, would you please answer the question as to what was said in that conversation between Mr. Seydler, Mr. Jones, and Mr. Daniels, while you were present, with respect to the two Neilson invoices of November, 1953?

A. Mr. Seydler asked Mr. Jones to explain each of the invoices we had securing our notes. The two Neilson invoices, Mr. Jones told Mr. Seydler, were consigned work which they planned to do. They made up the invoices and pledged them to the bank, but because of a fog delaying their boat, they were unable to keep the assignment; and therefore the work was never performed and the amount represented by the invoice was never earned.

Q. Miss Dionne, I asked you to examine the bank records with respect to a sight draft for approximately $18,000 on the Port Arthur Towing Company which was deposited by the C. J. Dick Towing Company on November 21, 1953.

I will ask you now whether you made such an examination of the records.

Mr. Wilson: I want to renew my objection as immaterial and irrelevant in point of time, too remote from the transaction in December, 1952, and January and February of 1953.

The Court: The same ruling as heretofore.

Q. (By Mr. Grundy) Did you make such an examination?

A. Yes, sir.

Q. Miss Dionne, what did the records of the Second National Bank reflect with respect to that sight draft?

A. C. J. Dick Towing Company drew a sight draft on the Port Arthur Towing Company of Port Arthur on November the 21st, 1953, in the amount of $17,854. The proceeds of this draft were credited to their account and the draft sent forth for collection in the usual way; and on November 30th, 1953, it was returned from the Port Arthur bank unpaid, with the notation "No Response to Notice."

Q. Now, Miss Dionne, you are looking at two photostat copies. I ask you first whether the top one—what is that a photostat copy of?

A. That is a photostat copy of our charge back to their account when the draft was returned unpaid.

Q. Is that part of the records of the Second National Bank?

A. Yes.

Q. Did you have that made for the purpose of bringing over to this lawsuit today?

A. Yes.

Q. The other instrument labeled "Customer's Draft"—

A. That is a photostat copy of the draft itself as presented.

Q. Is the original of that instrument in the records of the bank?

A. No, sir.

Mr. Wilson: Your Honor, may I throw in a little objection here to the leading form of the question? He could ask, "Where is the original of that?" or "Is it in the bank?" I have permitted it to go on for the sake of time, but I believe we ought to confine ourselves.

The Court: It is a leading question.

Q. (By Mr. Grundy) Miss Dionne, do you know where the original of that draft is?

A. The original of the draft is returned to the customer the same as any canceled check.

Q. Will you state whether or not the bank has a record in those files of that draft?

A. I have a photostat of every check paid.

Q. Where did this photostat come from?

A. From our records.

The Court: You mean the draft is returned to the C. J. Dick Towing Company?

The Witness: Yes, sir.

Mr. Grundy: Plaintiff offers Exhibit No: 65, being a photostat copy of a sight draft of November 21, 1953; and Exhibit 66, being a photostat copy of notice that the draft had not been paid, in connection with his previous offer of the note and assignment of accounts receivable and the testimony of Captain W. F. Fredeman of the Port Arthur Towing Company, as part of the offer tending to prove defendants had an actual intent to defraud their creditors.

(Thereupon the two documents above referred to were marked for identification by the reporter as Plaintiff's Exhibits Nos. 65 and 66, respectively.)

Mr. Wilson: I would object to it as being remote in point of time and irrelevant and immaterial to any issue in this case. I object to those exhibits, Plaintiff's Exhibits 66 and 65.

The Court: Same ruling heretofore made.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Now, in this case, Miss Dionne, will it be satisfactory to release those two photostat copies to the reporter?

A. Yes, sir.

Q. You have other copies in the bank's file?

A. Yes, sir.

Mr. Grundy: That is all.

Mr. Wilson: No questions.

The Court: You are through with this witness?

Mr. Grundy: Yes, Your Honor.

The Court: She may be excused.

Mr. Grundy: May the witness be released?

The Court: Yes, sir.

361 EDWIN I. DAVIS,

a witness called on behalf of plaintiff herein, having been first duly sworn on oath, testified as follows:

361 DIRECT EXAMINATION

Q. (By Mr. Grundy) State your name, please, sir.

A. Edwin I. Davis.

Q. Mr. Davis, it will be a little hard for us to hear you out here, so keep your voice up, if you will, please.

Q. What is your profession?

A. Certified public accountant.

Q. How long have you been a certified public accountant?

A. Approximately seven to eight years.

Q. Where did you receive your training and what did it consist of?

A. I graduated from the University of Texas in 1941 with a B.A., major in accounting. I have done post-graduate work, some at Harvard Business School, some at the University of Houston.

I have had accounting experience with one or two oil companies. I have worked for public accounting firms prior to opening my own practice. I did accounting work as an Internal Revenue Agent for the United States Treasury Department several years.

Q. When were you employed by the Treasury Department as a revenue agent?

A. Approximately 1948. I would have to go back and see the exact date.

A. I would have to go back and see the exact date.

Q. And approximately how long did you work for the Treasury Department?

A. Something over two years.

Q. What is your current occupation?

A. I have my own public accounting practice.

Q. Where is that located?

A. Houston, Texas.

Q. How long have you been so occupied?

A. Approximately five and one-half years.

Q. Now, Mr. Davis, were you—will you state whether or not you have been employed by the trustee in bankruptcy, H. A. Phillips, of the C. J. Dick Towing Company, for the purpose of making certain examinations of the books and records tendered to you and testifying in court as to the result of those examinations?

A. Yes, sir, I have been employed, although I have not seen the order entered.

Q. To make the record perfectly clear, state whether or not you have been advised by me, as attorney for the trustee, you were so employed?

A. Yes, sir, I have.

Q. And you have made the examination, have you not?

A. I would like to qualify the term "examination."

The term "examination" among accountants generally connotes a complete audit has been made, and I have not made any audit. I have made a review of certain records submitted to me and represented to be those of C. J. Dick Towing Company. I reviewed them and compared with them various figures in the books and various other statements.

Q. Mr. Davis, I am going to hand you first a group of ledger sheets bound together, marked Plaintiff's Exhibit No. 24, inclusive, and a brown manila envelope bearing on the outside "General Ledger Sheets, November 1, 1951, through October 31, 1952;" and ask you to state

whether or not you have seen those ledger sheets before today.

The Court: Is that anything that has already been offered?

Mr. Grundy: Yes, sir. It was identified by Mr. Daniels as the general ledger sheets for the period in question of the C. J. Dick Towing Company.

The Witness: Yes, sir; I have received these.

Q. (By Mr. Grundy) Mr. Davis, I am going to ask you to state whether or not you have prepared, and had prepared under your supervision of people in your office, a balance sheet of the invoices contained in those ledger sheets as of October 31, 1952?

A. Yes, sir, I have.

Q. Do you have that instrument with you, sir?

A. I have my work papers on it, yes, sir.

Q. Would you produce them, please?

The Court: It is about noontime. Before you go into that, the Court will recess until 2:00.

AFTERNOON SESSION — NOVEMBER 18, 1955

365 EDWIN I. DAVIS,

the witness who was on the stand at the time the Court recessed for luncheon, resumed the stand and continued his testimony as follows:

365 DIRECT EXAMINATION, CONTINUED

Q. (By Mr. Grundy) Mr. Davis, I am going to hand you again Plaintiff's Exhibit No. 22, which has been identified as a copy of the income tax return of the C. J. Dick Towing Company for the calendar year October 31, 1952.

I am going to ask you to examine that instrument and do you find thereon the balance sheet, statement of assets and liabilities, that it contains as in October 31, 1952?

A. I have the balance sheet before me, Schedule M of the return.

I beg your pardon; Schedule L.

Q. Now, Mr. Davis, what are the total amount of assets scheduled on that return?

A. The total amount of assets as listed on the return for the fiscal year ended October 31, 1952, total assets, are $1,065,133.16.

I notice on here that includes an item of treasury stock as an asset, and I don't believe that is to be considered as an asset on the balance sheet.

Q. What are the total liabilities on that particular schedule?

A. The total liabilities as shown on the schedule, one—I beg your pardon; I am reading the total.

The total on the return shows liabilities and capital. To give the exact total of liabilities, I would have to add up individual liability accounts here.

Q. Does your statement reflect any entry for net worth or earned surplus of the company?

A. Yes, there is an item on the return, on the balance sheet we are looking at, Items 15 and 16, which are items of surplus.

Item 15, paid-in and capital surplus.

Item 16, earned surplus and undivided profits.

Q. What is Item 15?

A. Item 15 amounts to $17,120.53, and that is shown as a red figure, and I take it to mean that is a surplus deficit.

Q. What is the other surplus item, No. 16?

A. Earned surplus and undivided profits, $165,053.85. It is likewise a red figure, and I take it that is a surplus deficit.

Q. I want to show you Plaintiff's Exhibit 63-b and c, with particular respect to—strike that.

Plaintiff's Exhibit 63-b and 63-c, which has been identified as being a balance sheet and statement of income and earned surplus for the year ending October 31, 1952, for the C. J. Dick Towing Company.

State whether or not you have examined that instrument and the copies thereof for this date.

A. I have a copy, probably, of this instrument. I had a copy with the return.

I would like to refer to my files and see if it is the same.

Q. Would you do that please?

A. Yes, sir.

(Short interval.)

The Witness: Yes, sir, I have here in my files a photostatic copy of this statement here which I used for comparison with the statement on the income tax return.

Q. (By Grundy) Did you make any analysis and comparison of those two financial statements?

A. You mean the financial statement as shown in this exhibit and the one as shown in the income tax return?

Q. Yes, sir.
A. Yes, sir, I did.

Mr. Wilson: Your Honor, I want to renew my objection again to this particular point.

I believe the statement was October 31, 1952?

Mr. Grundy: Yes, sir.

Mr. Wilson: And this income tax for the year 1952?

Mr. Grundy: It is the fiscal year ending October 31, 1952.

Mr. Wilson: As having no relationship, being immaterial and irrelevant to the assignment or transfer of the Green's Bayou stock by C. J. Dick Towing Company to United Towing Company.

The Court: Overrule the objection.

Mr. Wilson: I assume you are making the same ruling.

The Court: The same ruling.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) Mr. Davis, I believe I have already asked you whether or not you made any examination or inquiry or investigation, as you qualified the term, of the ledger sheets of the C. J. Dick Towing Company for the fiscal year ended October 31, 1952, which has been previously shown to you this morning; and I believe you stated you had made such an investigation; is that correct?

A. Yes, sir; we took a trial balance of the books as reflected by the ledger examined this morning.

Q. Mr. Davis, will you state the result of this analysis and comparison of the trial balance taken from the books and the balance sheets on the income tax return there and the balance sheet of October 31, 1952, which I have just handed you?

A. You want me to note the differences, if any, between these three statements in the income tax return?

Q. If you find any difference.

A. And the trial balances on the books?

Q. If you find any differences between the statements, will you state what they are and whether or not you are able to find what the reason for those differences was?

A. Well, I have here a work sheet which was prepared under my direction which reflects differences in certain accounts between those three statements.

Now, the statement as shown on the income tax return, the statement as shown on the income tax return and the trial balance that was taken from the ledger are here substantially in agreement. There was one adjustment of approximately $21,000 between the books and the income tax return, and although we didn't ascertain definitely what there was, there was an indication that it was a statutory adjustment to account for an emergency permit that they had had for rapid depreciation for tax purposes which was not recorded on the books, and that was the only substantial difference between the books and the income tax return balance sheet.

Q. With respect to the other balance sheet, I want you to state whether or not there was a substantial difference between that balance sheet and the income tax sheet.

The Court: What is that other balance sheet?

Mr. Grundy: Previously identified as the balance sheet and financial statement given to the Second National Bank as of the same date.

The Court: All right.

The Witness: The differences that we found between the balance sheet of October 31, 1952, which was given to the Second National Bank, and the balance sheet for the books was approximately $331,714.95.

Q. (By Mr. Grundy) In that taking of this trial balance from those books of the company, were you able to locate any explanation of the various accounts which made up that 331,000-dollar difference?

A. I have analyzed the differences, and for the differences by amount as to specific accounts; but as to the reasons for the differences, I was not—none came to my attention.

Q. What are the differences by accounts, Mr. Davis?

A. Well, the accounts will fall into two groups, asset accounts and liability accounts.

We have a difference of $231,714.95 in the earned surplus account, and that is accounted for by two groups of accounts; one, the asset accounts were overstated by $43,541.66—and I say "overstated;" that means on the balance sheet presented to the bank they were overstated when compared to the balance sheet as shown on the income tax return.

Then in the other category of accounts there is an understatement of liability of $288,173.29. I can give you the individual accounts within those two.

We have an overstatement of assets of $43,000 and an understatement of liabilities of $288,000.

Q. What I want to know is what went to make up the understatement of liabilities of $288,000.

A. There was a difference in the account entitled "Accounts and Vouchers Payable," a difference of $240,013.55.

Q. Let me ask you as to that item.

Will you state what that difference—which figure was the highest figure and which figure was the lower to account for that 240,000-dollar difference?

A. Well, the accounts and vouchers payable balanced according to the books of the company as of October 31, 1952, showed a balance of $424,802, and the statement that we have reviewed, which was presented to the bank, showed a balance of $184,788.44; so as between the two statements, there was an understatement on the statement given to the bank in the amount of $240,013.55.

Q. What other accounts went to make up the total understatement of the liabilities?

A. There was an understatement of notes payable in the amount of $29,888.

There was an understatement in an account entitled "Other Liabilities" of $20,236.75.

There was an understatement in accrued interest and taxes of $17.64.

There was an overstatement of accrued wages of $1982.65.

Those are differences in the liability accounts.

In the asset accounts there was a difference in the cash account of $30,885.58.

The Court: Which is the larger?

The Witness: I was just going to explain that.

The cash account, based on the statement to the bank of cash in the bank of $8495.64 and the cash account on the books of the company showed an overdraft of $22,389.98.

Accounts receivable—

The Court: Does that mean they had no cash?

The Witness: According to the books, an overdraft of $22,389.88 and a statement to the bank of $8495.64; a difference of $30,885.58.

Q. (By Mr. Grundy) Were there any other asset accounts that contained the differences as between those statements?

A. Yes, sir.

In accounts receivable there was an overstatement of accounts receivable of $9999.59. On the statement to the bank the accounts receivable balance was shown as $123,381.40, and on the accounts receivable account in the company books there was a balance of $113,381.81.

In the material and supply account—I take it that is an inventory account—there was an overstatment or difference of $2342.06. The statement to the bank on that account showed $6979.45. The books of the company showed $4633.49.

On the account prepaid interest, there was an overstatement of $314.43. The statement to the bank showed $945.60 and the Company books, $631.17.

Those are the only account differences we found in the assets accounts.

Q. Mr. Davis, would you explain what you meant a moment ago when you said a difference of $331,000 between the financial statement attached to the income tax return and the financial statement identified as having been given to the bank as of the same date?

A. The 331,000-dollar difference was in the surplus account, earned surplus account, as shown on the statement given to the bank showing a credit balance of $169,514.82, whereas the book surplus accounts showed a deficit of $162,200.13.

Q. Was that book surplus account the same as the surplus account deficit on the income tax return?

A. It was the same, I believe, except for this emergency amortization adjustment they made for income tax purposes.

The difference of $21,011 between that surplus figure and the figure on the income tax return.

Q. Does the exhibit handed to you as Plaintiff's Exhibit 63, being a financial statement given to the Second National Bank as of October 31, 1952, contain a true and accurate statement of the financial condition of the C. J. Dick Towing Company as reflected by the ledger which you have examined?

A. I would say it does not.

Q. Mr. Davis, are you in a position to state whether or not you could give any opinion as to a solvency or insolvency of the C. J. Dick Towing Company as reflected by the statement given to the bank, Plaintiff's Exhibit No. 63?

A. You mean whether I could express an opinion as to the solvency and insolvency as of October 31, 1952, as reflected by those statements?

Mr. Wilson: I assume I have a running objection to all of this?

The Court: Yes.

The Witness: Well, to be sure I understand the term "insolvency," you mean the general accounting concept of insolvency; inability to meet obligations as they currently materialize.

The Bankruptcy Act goes a step further and defines it as liabilities in excess of assets.

Q. (By Mr. Grundy) Go further, and if you have any opinion as to either test of solvency or insolvency, will you state what that was?

A. As for the reflecting of liabilities in excess of assets, I would say as of October 31, 1952, that the books would reflect liabilities in excess of assets.

Now, as to the other test, whether they could meet their obligations as they materialized, that would be a question I don't believe I could answer.

Q. Merely from an examination of the books at that time?

A. No, sir. That would be a question of fact at that time, whether they could pay their debts.

Q. Will you state whether the test of insolvency is measured by a deficit in earned surplus accounts?

Mr. Wilson: I object. He has stated what the insolvency is under the Bankruptcy Act and under the general accounting practices, and he has said he cannot tell under the Bankruptcy Act whether it is insolvent. He is being asked a question now—

The Court: I think that objection is good.

Q. (By Mr. Grundy) Mr. Davis, will you state what the deficit in the earned surplus account of $167,000 shown on the balance sheet attached to the income tax return represents with respect to assets and liabilities?

A. It represents the net difference—let me put it this way, the earned surplus and capital stock account or the equity account of the business, and the equity account represents the excess of assets over liabilities; consequently, if there is a credit balance in the equity account, either to the credit balance and the capital stock in earned surplus, that indicates the assets exceed the liabilities.

On the other hand, if there is a deficit in the total of both accounts, that indicates the liabilities are in excess of the assets.

Q. Will you state by what amount the liabilities then of the C. J. Dick Towing Company, according to the books you examined as of October 31, 1952, exceeded those assets?

A. As of October 31, 1952?

Q. Yes, sir.

A. According to my calculations on October 31, 1952, the company's liabilities totaled $1,568,609.98.

Its assets totaled $1,386,435.60, or a net capital deficit of $182,174.38.

Q. Now, Mr. Davis, did you make any examination of the general ledger of the C. J. Dick Towing Company as of the 31st day of January, 1953?

A. I will go back and qualify the term "examination" again.

We did not make what an auditor calls an examination or audit. We made a review and listed the accounts in what we call a trial balance to take off what we call a balance sheet per the books.

Q. Will you state the total amount of assets and liabilities of the C. J. Dick Towing Company as shown by this trial balance taken from those books as of January 31, 1953?

Mr. Wilson: I object to that. As he said, it is not a complete audit, and if he is going to testify as to figures of assets and liabilities, I think his audit should be complete instead of an incomplete statement.

The Court: I think the objection is not good for the reason that the Court cannot accept his statement and his audit as absolutely correct, nor could the Court reject him. The Court has to go into them and investigate them and see whether or not they are correct before he adopts them as part of his findings.

Now, Counsel, because he doesn't make a complete inventory of the books of the company doesn't mean, I think, that what he has made here might not be helpful in reaching a conclusion in the matter.

Objection overruled.

Mr. Wilson: Note our exception.

Q. (By Mr. Grundy) You may answer this question. Do you want the question read back?

A. Yes.

The Official Reporter. (Reading): "Will you state the total amount of assets and liabilities of the C. J. Dick

Towing Company as shown by this trial balance taken from those books as of January 31, 1953?"

The Witness: The total liabilities per the books—I don't have a total of the liabilities themselves. I have a total of the customary credit balances which include the equity accounts as a credit balance offset by the asset account in the treasury stock account and the surplus deficit; but I can tell how much credit balance exceed the debit balance, which in substance is the surplus deficit on that date.

Q. (By Mr. Grundy) Is that surplus deficit subject to the same definition you gave a minute ago of the deficit in the capital surplus account as of the 1952 statement that I believe you testified that represented the net difference between the asset and the liability, did you not?

A. That is right. There is a net surplus deficit on that date of approximately $79,000.

Q. All right, sir. Now, did you make such a review or investigation of the general ledger of the C. J. Dick Towing Company, and did you prepare a trial balance sheet as of September 30, 1953?

Mr. Wilson: Same objection to that. It is remote, not related to any issue in this case.

The Court: Same ruling.

Mr. Wilson: Note our exception.

The Witness: Yes, I made a trial balance of the books of C. J. Dick Towing Company as of September 30, 1953.

Q. (By Mr. Grundy) Now, what did this trial balance as of September 30, 1953, show with respect to the capital surplus account?

A. There was a net capital deficit according to the books of $100,624.80.

Q. Now, did you make such a review and investigation of those same books for the date of October 31, 1953?

A. Yes, sir, I did.

Q. Did you prepare from that investigation a trial balance?

A. Yes, sir, I did, similar to the others.

Q. Will you state what the trial balance as of October 31, 1953, showed with respect to that difference between assets and liabilities?

A. On that date there was a net capital deficit of $59,717.59. October 31, 1953.

Q. May I see this a minute?

A. Yes.

Q. One other question with rsepect to Plaintiff's Exhibit 63-b, being a part of the October 31, 1952, statement which was given to the Second National Bank.

What is the amount of the net income for the fiscal year ending October 31, 1952, as shown by that statement?

A. I believe it shows a loss of $45,586.36. The reason I say, "I believe;" the figure would probably show as a red figure, but when it was photostated it showed in black; but at the foot of the column it appears as a loss of $45,000.

Q. Handing you Plaintiff's Exhibit No. 63-b, in the original form before it was photostated, I ask you whether you can answer the question a little more easily?

A. It shows a loss of $45,586.36.

Q. Will you state whether that loss is shown on the original in red ink?

A. Yes, sir, it is in red.

Mr. Grundy: Your Honor, I think at this point I would say to the Court that I discovered in the photostating process black and red portions of this do not show, and therefore I am going to withdraw my request of this morning and re-offer the original instrument with the record, because otherwise we do not believe the photostat will truly reflect the information contained thereon.

Mr. Wilson: It is quite all right.

The Court: Very well.

Q. (By Mr. Grundy) Now, what was the net income figure for the fiscal year ending October 31, 1952, as reflected on the income tax return?

A. The U. S. Corporation income tax return for the fiscal year ending 1952 shows a net income in red figures and it is described as a loss, $389,517.21.

Mr. Grundy: I believe that is all.

382 CROSS EXAMINATION

Q. (By Mr. Wilson) Mr. Davis, I don't think it too important, but I forgot to ask you; are you a CPA?

A. Yes, sir; licensed in the State of Texas.

Q. When did you first start working on those books of C. J. Dick Towing Company; examining them, so to speak?

A. I would have to look back in my office on my time records. I would approximate possibly two weeks ago.

Q. Two weeks ago?

A. I would say possibly.

Q. And it is your opinion you have made a thorough examination of all the books and papers having to do with C. J. Dick Towing Company business for the year that you have testified to?

A. No, sir, I believe not; and I believe I so stated.

I will explain the term "examination" as an accountant knows it.

Examination means a complete audit of the company books and a complete independent verification of the accounts, a reconciliation of the bank statements, physical inspection of the assets, and totaling their records; reviewing the system of internal control to determine if it is reliable, and checking many, many features that take quite a bit of time, and accountants are particular in distinguishing between examination and a review of the books.

A review of the books would be something like taking off a trial balance and reading accounts.

Q. A complete audit, as you stated, might change those figures considerably?

A. No, sir, I believe I would not state that.

Q. I am asking you; would it not?

A. You are asking me would it? I could not say that.

Q. But it is possible, is it not?

A. It is possible, yes, sir.

Q. That is what I am asking you. Now, you are not sure whether you have examined all of the books of C. J. Dick Towing Company, are you?

A. I am pretty sure I have not. I think I can—I think I confined my remarks to the general ledger.

Q. These ledger sheets you are talking about, you are not sure those compile all of the ledger sheets; am I right on that?

A. No, I am not sure.

Q. In other words, what you had to work with, you took those figures off of?

A. Yes.

Q. And if there were other sheets not in the ledger, that might vary those figures?

A. Yes, sir; but in those instances, I believe in most instances they would have had to be sheets missing with equal debits and credits, because I believe we balanced the shets the debits and credits; so if a sheet with a debit was missing, a sheet with a credit balance equal to it would have to be missing.

Q. In figuring your assets—

The Court: Would you go over that again?

The Witness: In explaining whether or not a sheet was missing, the problem or purpose of an accountant's trial balance is to see the debits and credits of a set of books are in balance, and in most instances we balanced the debits and credits in the books; so if a sheet were missing with a debit balance, a sheet with a corresponding credit balance would also have to be missing in order to make the books still balance.

That is one purpose of a trial balance, to try to insure all the sheets balance.

Q. (By Mr. Wilson) These are the general ledgers? Is that was you say?

A. Yes, sir, that is right.

The Court Was the paging in the general ledger regular?

The Witness: I beg your parodon?

The Court: Was the paging in the general ledger regular?

The Witness: They appeared to be in the general order that a general accounting set of books would be. The assets preceded the liabilities, and they were about in the general order a set of books would be.

The Court: Were they looseleaf?

The Witness: I believe it was a post binder. That is a looseleaf system, yes, sir.

Q. (By Mr. Wilson) Are the pages numbered in those?

A. I don't recall whether they are or not. I would have to look and see.

Q. You say then the only difference between a trial balance and an audit would be a verification?

A. In the amount of work to be done? Yes, sir; that is right.

Q. Do you know what the gross income of the C. J. Dick Towing Company was the fiscal year ending October 31, 1952?

A. Gross income? You mean from the receipts of towing operations, or towing operations and sale of assets?

Q. The total gross income.

A. The total gross income or, the gross receipts?

Q. I may not know all your accounting terms, but I want to know the total amount of money that was received for that fiscal year.

A. That is October 31?

Q. 1952.

A. I can give you the income amounts as shown by the books, yes, sir.

I beg your pardon. I don't have those work papers with me.

Q. Do you have those gross receipts?

A. No, sir, I don't for October 31, 1952. No, sir, I do not.

Q. I thought you gave me a figure of some form of gross income or net income. I believe you gave me, wasn't it for the fiscal year of 1952 ending October 31?

A. Yes, sir; but you asked me for gross income. I can give you the net, but not the gross without the work papers and looking at the books.

Q. You do not know what the gross income was?

A. No, sir.

Q. But you have arrived at a net income?

A. I would say I didn't necessarily arrive at it. I took it as it was reflected in the books. The books reflected a net income figure.

Q. You took it off the books—

Mr. Grundy: While Counsel has certain rights to cross-examine, I believe the record will show my only question with respect to net income here, as to the net income figure shown on the exhibit in evidence; first, the statement given to the Second National Bank on October 31, 1952, and second, the statement on the income tax return as of the same date; I simply asked him to state what those instruments recite, and I believe any cross examination as to those net income figures probably should be limited to that.

The Court: I don't think it is improper cross examination.

Go ahead.

Q. (By Mr. Wilson) You have given us a net income, Mr. Davis, and you say you cannot determine how you arrived at that net income except that you took it off the books?

A. That is right.

Q. So you don't know just what made up that net income or why that figure was on the books as set out?

A. No, I would have to review the individual accounts.

Q. You don't know whether included in that net income there are equities in equipment added to that or not, do you?

A. You say income equities and equipment?

Q. Being purchased or—

A. Let me see if I understand you.

Ordinarily equity is an asset, and generally assets would not appear in an income statement as a general rule.

Q. That would increase the income in a general statement if you say they are added to it?

A. I don't know. I wouldn't say—I am not sure I follow you.

Q. Let me get your answer. You said they would not be included in a general statement; is that right?

A. I say predicated on the fact that an equity is generally, accountingwise, considered as an asset, and to go a step further, assets do not appear on an income statement, a profit and loss statement.

Q. If there were any equities, and you said you have not discovered them, that would increase the income as set out in an income tax statement, not on the statement, but increase the income the company had that particular fiscal year?

A. I don't believe I could—

Q. Maybe I don't give it in exactly your terms, but you say they are not included in the income tax.

A. I said income tax statements. Profit and loss statements.

Q. They would not show in that?

A. Generally not.

Q. So there could be quite a bit of difference in those bank statements between the profit and loss statements on the books of the company which would show those equities?

A. I believe some of those statements given to the bank were balance sheets as well as profit and loss.

Q. There were both on there.

Take another situation there. For instance, take a situation where the company has purchased equipment under a lease rental or rental lease purchase where they set up on their income tax statements another statement, income profit and loss statements, they charge off that rental paid on this lease purchased equipment.

Now, that is not ordinarily shown on bank statements and such as that, but actually the company would be building up an equity in that equipment, whereas they are entitled by law to charge that off as an expense.

Am I right on that?

A. Under certain conditions they are allowed to charge it off for income tax purposes, but that is not a clear-cut proposition.

Q. And that would make a variance between the bank statements and the income tax statements, and also book audits as compared to the other two?

In other words, you would have three different sets of balance sheets if you were going into it that way. Am I right on that?

A. I don't—you are taking a hypothetical proposition. You could have three different balance sheets?

Q. Yes.

A. And you purchase under a lease purchase agreement and have not exercised any option?

Q. You have not exercised any option.

A. I would say accountingwise you would not be justified in showing any equity on your books because, in fact, you didn't own any.

Q. You didn't own any equity when you had made certain purchases under lease purchase agreements where you had the right to purchase the vessel?

A. No, sir. Under general accounting procedure I don't believe you would be correct in showing any equity in that.

I might be under some arrangement to footnote a balance sheet with a disclosure that you have an option to acquire, and in the event you did, you might have certain equities; but in getting into the matter of equities, you would have a question of whether or not depreciation had actually exceeded any equity you are building up.

Q. In other words, in an income financial statement to the bank that would not be shown on it, those equities?

A. I would say not. Not without certain disclosures.

Q. And not shown on any income tax statement?

A. We are dealing again with a hypothetical situation.

Q. You just said there would be no equity because general accounting—

A. We are getting into something else. Income tax is not accounting. It is statutory and they tell you how to treat those things, and your current purchase under the lease purchase arrangement, they do not always say where you can charge those off.

Q. You should have three different statements, if you want to call them that; one that would go to the bank, which would not take into account the equipment—the equities you were building up in equipment; another made out on a different form for income tax purposes, and that would be taken from the books, which would add it up differently?

A. I don't believe you could, under generally accepted accounting principles. I don't believe that you could for three, no, sir.

Q. If you are building up assets in some equipment, or equities, they would be considered assets in the event of normal liquidation, wouldn't they, or sale of that equipment?

A. In the accounting concept of statement presentation you generally have a going concern concept of a business, and as such I don't believe you would be justified in showing any assets on the books which you do not in fact own.

Q. You wouldn't be justified in showing equities in equipment?

A. We get into the term "equity," and not being an attorney,—

Q. As a matter of fact, if you paid on certain purchase contract of purchase equipment, you have an equity in it if you have a right to buy it later?

A. You may have and you may not have. It may be a depreciating and deteriorating feature.

Q. You have something there if it isn't offset by something else?

A. You have something if you exercise your option.

Q. I grant you that.

A. Accountingwise, from a financial statement as that, at the far outside all I could say was a disclosure in a

footnote to a balance sheet that that condition existed; but I could say any assets not owned on a balance sheet.

Q. In other words, a company has something there, but they shouldn't show it on the books? That is the simple way?

Mr. Grundy: I object to that as being a statement by Counsel of what the witness said.

Regardless of cross examination, he has answered that same question four times in four different ways, and each time in the negative.

The Court: Go ahead.

Q. (By Mr. Wilson) Can you give the gross income of the C. J. Dick Towing Company on October 31, 1953?

A. No, sir; I don't have that.

Q. You are in the same position on it as you are in the other one?

A. Yes.

Q. You have simply taken the net balance shown on the books of the company?

A. Yes.

Q. You have no idea how that might be arrived at because you didn't go into that portion of it?

A. How the net income—

Q. —was arrived at. You didn't check back?

A. We can by checking the general income arrived at by deducting the expenses from the receipts, but I made no specific computation.

Q. Let's take the tax returns you were talking about. Are the assets on them shown at fair market value, or net value?

A. That is a question of fact I could not answer because I have not verified what the cost value or the fair market value of them is.

Q. You couldn't determine as to the correctness of them one way or the other as to net value or fair market value?

A. No, sir.

Mr. Wilson: I believe that is all.

The Court: Any further questions?

Mr. Grundy: Yes, sir.

The Court: May I take a recess first?

Mr. Grundy: I think that will be just as well.

The Court: Recess for 10 minutes.

(Short recess.)

394 REDIRECT EXAMINATION

Q. (By Mr. Grundy) You were asked a moment ago by Mr. Wilson whether or not you had made any audit, and if an audit would make a difference in your investigation or review of that general ledger.

I would like to ask you this question: if the entries in the general ledger which you examined were correct entries based on the original information given to the person making the entries, then would an audit or a detailed examination make any difference in the balance sheet which you took off of that book?

Mr. Wilson: Your Honor, I believe we are going into repetition again. I am perfectly willing to let him, but I think it is a rehash all over again.

The Court: Let him answer.

The Witness: An audit would not make any difference in the balance sheet if the books reflected the transaction in accordance with general accepted accounting principles. An audit is a verification to determine if the transactions have been entered in that manner, and the only time an audit changes the result is when they have not been entered properly.

Q. (By Mr. Grundy) Now, Mr. Davis, we were talking also a moment ago, Mr. Wilson was asking you at length about those equipment equities the company claimed to have had in certain floating equipment, and he asked you whether or not those would be shown on the balance sheet.

I believe you testified good accounting practice would dictate the equities and purchases to which the company had not acquired legal title would not be shown as an asset on the balance sheet of the company?

A. That is correct.

Q. When he asked you to explain the difference of $331,000 in the capital account of the company, the C. J. Dick Towing Company, the difference of $331,000 between the financial statement on the income tax return in 1952 and the financial statement given to the bank in 1952, you identified certain adjustments or changes; reductions or increases in liabilities and assets.

I ask you to state whether or not any portion of that

331,000-dollar difference, from your examination, appeared to have been accomplished by the use of the equipment equities Mr. Wilson was asking you about.

A. In other words, were any of the differences in any of those accounts, were any handled in such a manner they would reflect equity?

Q. That is right.

A. I would say not.

Q. Will you state whether or not on the financial statement of October 31, 1952, identified as having been given to the bank, there were any explanatory statements which respect to equipment equities?

A. I find no explanation; no, sir.

Q. Will you state whether or not that balance sheet of October 31, 1952, given to the bank, contained any explanatory footnotes or other explanation as to how the valuation of the assets of the company were arrived at?

Mr. Wilson: I object to that, Your Honor. I believe that those are in evidence, those financial statements, and they speak for themselves, Your Honor. I think the witness' explanation of them is unimportant.

The Court: There may be some things that I don't understand. I think the question might be answered.

The Witness: I find no indication on the balance sheet as to the method of valuation used in stating the assets.

Mr. Grundy: No further questions.

Mr. Wilson: No further questions.

397 H. A. PHILLIPS,

trustee, and plaintiff herein, a witness called in his own behalf, having been first duly sworn on oath, testified as follows:

397 DIRECT EXAMINATION

Q. (By Mr. Grundy) State your name, please.

A. H. A. Phillips.

Q. Mr. Phillips, you are the plaintiff in this lawsuit, are you not?

A. I am.

Q. The trustee in bankruptcy of the C. J. Dick Towing Company?

A. I am.

Q. Mr. Phillips, I have asked you to obtain from the clerk of the court the clerk's copy of the schedules filed by the bankrupt in this case. Will you look at those schedules, please, at the last page.

If we may have a moment, Your Honor, we can shorten this.

(Off the record discussion.)

Q. (By Mr. Grundy) Will you strike that last question, please, ma'am?

Mr. Phillips, will you state whether or not you have made any examination of the claims filed in the C. J. Dick Towing Company bankruptcy proceedings?

A. I have.

Q. Will you state what the total amount of the claims are so filed, sir?

A. This is an adding machine tape which I took off the referee's docket on which the claims are listed. It shows a total of 106 claims have been filed in the proceedings, and that the total amount of those claims is $601,232.20.

The Court: The time for filing claims has expired?

Mr. Grundy: Yes, Your Honor; in November of 1954.

Q. (By Mr. Grundy) Mr. Phillips, of that 601,000-dollar figure, what do the referee's records reflect as to the claims which are filed as priority claims or secured claims?

A. There are four tax claims filed totaling $31,191.76, none of which have been paid; and there are wage claims filed as priority claims, which have not been paid, totaling $2290.70. That is a total of $33,482.46 in priority claims.

Q. How much money does the estate have as of this date in your possession as trustee?

Mr. Wilson: Your Honor, I want to object to this, my same objection I have been carrying all along; that the bankrupt schedule claims filed, the total amount, or anything with reference to it on February the 26th, 1954, when the involuntary petition was filed, or the filing of claims, has nothing to do with the transfer or pledge, or both, of the Green's Bayou stock by the C. J. Dick Towing Company to United Towing Company in December of 1952.

The Court: Same ruling.

Mr. Wilson: Note our exception.

Mr. Grundy: Your Honor, I might say in this particular case I am going to offer that evidence for a further and

additional purpose, being one of the allegations of the complaint is to set aside a preferential transfer under Section 60 within four months of bankruptcy; and it is essential and incumbent upon the plaintiff trustee to establish that the effect of the transfer to a creditor was to enable him to obtain a greater percentage of his debt than other creditors of the same class.

Mr. Wilson: I may have my running objection to that?

The Court: You made no objection to that offer. That is the first time that offer has been made.

Are you objecting to that?

Mr. Wilson: I believe, as I understand, for the purpose of showing that the creditors were placed in such a position, I think the burden is on him first to show a preferential transfer within the four months before it could become material.

The Court: The objection is overruled.

The Witness: I believe the question was how much money do I have on hand?

Q. (By Mr. Grundy) Yes, sir.

A. $74,998.47.

Q. In addition to the money in your possession, do you have, as trustee of this estate, any other assets of the estate?

A. The only asset that I know of that hasn't been disposed of is, I believe, a marine pump that is down at the shipyard, which is owned by the Green's Bayou Marine Service Companyy, whatever its name is.

Q. Do you know the approximate value of that pump?

A. It has been variously stated as anywhere from $1000 to $5000, but I have never been able to get a definite offer of any amount for it.

Q. Mr. Phillips, how long have you been acting as trustee in bankruptcy in various cases in the United States District Court, off an on?

A. More than 25 years.

Q. Mr. Phillips, are you able, from your knowledge of the assets of this estate and the claims filed, to give any estimate or opinion as to what the probable dividend to the unsecured creditors of the estate would be?

Mr. Wilson: I object to that as calling for an opinion and conclusion of the witness. The claims have all been filed. If it is a penciled determination, I think you could do that. I wouldn't object to that, but as to saying what else might happen, you have $74,000 cash, plus the value of that pump, and $6000 worth of assets, and it is a penciled determination of calculation on the books.

The Court: What I understood, it is an estimate or a guess.

Mr. Wilson: If it is that, I have no objection; but if it goes to something else, I do.

Mr. Grundy: I asked his opinion.

The Court: Objection overruled.

Mr. Wilson: Note our exception.

The Witness: Well, from the $74,000 which we have on hand, first would have to be paid those priority claims

totaling $33,000; roughly. That would be $41,000 left, out of which woul come the administration expenses; and what was left after the priority claims and administration expenses were deducted would be available for payment of dividends.

Just a rough estimate of the administrative expenses, which would include the referee's salary, the referee's expense fund, the trustee's fees, and the referee's expense for notices and claims filed, as well as the attorneys' fees for the trustee's attorney; I would say all of those expenses would not exceed 7400 to $10,000, and you could deduct $10,000 from $41,000 and you would have $31,000 with which to pay roughly $570,000 in claims.

It won't go very far.

Mr. Grundy: I believe that is all.

The Court: Cross examination?

Mr. Wilson: No, I don't believe there is any cross examination, Your Honor.

"VI. The averments of Paragraph VI are denied except as hereinafter admitted:

"The contract and agreement to transfer the Green's Bayou Marine Service Company's stock, in full settlement of the pledge of the security, became a binding and legal obligation between C. J. Dick Towing Company and United Towing Company on February 6, 1953, when those companies had approved and accepted it. Although a binding contract had been entered into, the actual surrender of the pledged stocks by the pledgee or mortgagee, for a new certificate to complete the conveyance, was not to take place until October 1, 1953. Defendants deny that the said transfer of the stock was made without fair

consideration or that the value of said capital stock was greater than the debt satisfied, or that the transfer rendered the said C. J. Dick Towing Company insolvent, but instead allege that the transfer had just the opposite effect, it kept C. J. Dick Company operating and making money, instead of having to refinance its operations which it did not consider possible."

* * * *

"VIII. The averments of Paragraph VIII are denied except as hereinafter admitted:

"Same statement as under Paragraph VI.

"Defendants deny that said transfer of stock was made by the C. J. Dick Towing Company with intent to hinder, delay or defraud its then existing and future creditors, but on the contrary say that said transfer was made for the exact opposite reason, that is, so that C. J. Dick Towing Company could continue its operation of making money instead of having to use its much needed capital to redeem the stock, also because the stock would not sell for enough to redeem it, and it would be necessary to sell its boats and barges and other assets to derive enough capital to redeem it which would definitely have put it out of business."

Mr. Wilson: I am going to object to that as an abandoned pleading, as it is my original answer. It is immaterial in this case because it has been abandoned.

Mr. Grundy: It is specifically offered, Your Honor, as an admission by the defendant.

The Court: You are talking about a state court rule or a federal court rule?

Mr. Wilson: I think where a pleading has been substituted by a complete amended pleading, maybe I am wrong, but I take the position the other pleading then becomes an abandoned pleading.

The Court: I will let it in and you can look up cases.

Mr. Wilson: I may be wrong, Your Honor.

The Court: If you find anything to the contrary—

Mr. Wilson: I know the state rule is that, and I may be wrong on the federal rule, Your Honor.

470 FINDINGS OF FACT AND CONCLUSIONS OF LAW

(dated, March 14, 1956)

(Caption Omitted)

STATEMENT OF THE CASE:

The C. J. Dick Towing Company, Bankrupt (for brevity called Bankrupt), was on and before October 1, 1953, the owner of all the capital stock of Defendant Greens Bayou Marine Service Company (for brevity called Greens Bayou). On that date is is claimed that Bankrupt transferred such stock to Defendant United Towing Company (for brevity called United), in satisfaction of an antecedent debt claimed to be owing by Bankrupt to United.

This is a suit by the Trustee in Bankruptcy of Bankrupt (for brevity called Trustee) seeking to have such transfer set aside for the following claimed reasons, to-wit:

Because, as claimed, it is unfair to Bankrupt and its creditors, illegal and against public policy in that the same persons were officers and directors and directed the affairs of both companies.

Because, as it is also claimed, such transfer should be held void under the statutes or laws of Texas because made with the intent on the part of United, its Directors and Officers to hinder, delay and defraud the creditors of Bankrupt.

Because, as it is also claimed, that under the Bankruptcy Act, such transfer constitutes a conveyance fraudulent in law within the meaning of Section 67, Subdivision (d) (2) (a), (d) (2) (b) and (d) (2) (d) of the Bankruptcy Act (Section 107 (d) (2) (a), (d) (2) (b) and (d) (2) (d), Title 11, U.S.C.A.).

This suit is also by the Trustee in Bankruptcy against John D. Jones, Holt P. Daniels and Greens Bayou Marine Service Company to recover certain assets, etc., of such company, but on February 29, 1956, and after the trial and while this case was under submission the following *agreed* order was entered:

> "At Houston, in said district, on the 29 day of February, 1956.
>
> It appearing to the Court that the claim and cause of action for rents and profits, asserted by plaintiff against defendants, John D. Jones, Holt P. Daniels and Greens Bayou Marine Service Company in Paragraph XVI of the Second Amended Complaint on file herein, in furtherance of convenience, should be severed from the remaining claims and cause of action asserted in said Second Amended Complaint, and there being no objection thereto, it is, accordingly,

ORDERED that the claim and cause of action asserted by H. A. Phillips, Trustee, plaintiff, against John D. Jones, Holt P. Daniels and Greens Bayou Marine Service Company, defendants, for rents and profits allegedly collected and realized by said defendants from certain real property, all as more particularly alleged in Paragraph XVI of said Second Amended Complaint, be, and the same hereby is, severed from the remaining claims and cause of action asserted in said Second Amended Complaint; and it is further

ORDERED that said cause of action as hereby severed shall be tried separately, and that all evidence heretofore taken and admitted in this cause, together with objections and exceptions thereto, may be considered by the Court at such separate trial of said severed causes of action, together with any other admissible evidence."

The trial was before the Court without a jury and the following Findings of Fact and Conclusions of Law are filed in the part of the suit brought to set aside such transfer:

FINDINGS OF FACT:

(a) An involuntary petition in bankruptcy was filed against Bankrupt on February 26, 1954, and it was thereafter adjudicated a bankrupt. H. A. Phillips was appointed Trustee and brings this suit as the duly qualified and acting trustee of such estate. There is jurisdiction here under the provisions of the Bankruptcy Act.

(b) The Bankrupt (C. J. Dick Towing Company), a Texas corporation, was organized by C. J. Dick in 1947 to do a towing business. In July 1949, Defendants John

D. Jones, Holt P. Daniels and Harland I. Casteel bought all the capital stock of Bankrupt from Captain Dick for a total consideration of $300 cash and the promise of Bankrupt to pay Captain Dick $199,700 out of its earnings. Jones was an insurance agent who had been writing insurance for Bankrupt. Daniels had been an employee of Bankrupt in an accounting capacity; and Casteel, of Pittsburg, Pennsylvania, had procured some towing business for Bankrupt on a commission basis. These three persons never made any further investment in the *capital stock* of Bankrupt, but thereafter owned all of its capital stock.

(c) United Towing Company, a Texas corporation, was organized in 1952 by said John D. Jones and Harland I. Casteel with a total capital investment by them of $1250. Later said Holt P. Daniels purchased from Jones and Casteel 250 shares of the stock of such corporation for a consideration of $250. Neither of these three persons ever made any further investment in the capital *stock* of United. United was organized to do the same type of business as Bankrupt was doing.

(d) Greens Bayou Marine Service Company is a Texas corporation, organized by Captain Dick in 1948 to acquire and operate a shipyard on approximately 18 acres of valuable land, etc., on Greens Bayou near Houston in Harris County, Texas. Bankrupt owned all of the capital stock of Greens Bayou until October 1, 1953, when this stock was transferred, as claimed, to United. Greens Bayou still owns such land, etc.

(e) At all material times herein Defendant Jones was the President and a Director, and Casteel was the Vice

President and a Director of all three corporations. They were at all material times the only officers and the only directors *of these three corporations.* In addition to owning all of the stock of Bankrupt, these three persons owned a substantial amount and apparently most of the capital stock of United. Jones and Daniels, for a time, drew salaries as officers of Bankrupt, and Casteel, for a time, drew retainer fees from Bankrupt. For brevity Jones, Daniels and Casteel may be referred to as "Three Directors".

(f) Jones, Daniels and Casteel also constituted all of the officers, directors and stockholders of John D. Jones, Inc., another Texas corporation. Bankrupt, United, Greens Bayou and John D. Jones, Inc., all had their principal offices at 1310 McKinney Avenue, in Houston, Texas, in a building owned and operated by a limited partnership known as "1310 McKinney Avenue, Ltd.", in which Jones, Daniels and Casteel were limited partners. John D. Jones also operated an insurance agency from the same address, under the name of John D. Jones and Company, which carried the insurance of Bankrupt, United, Greens Bayou and John D. Jones, Inc.

(g) Defendants claim that in December 1952 the stock in Greens Bayou owned by Bankrupt was pledged by Bankrupt to United. I do not find that there was such a pledge. The facts with respect thereto are substantially as follows:

Prior to and during the latter part of 1952, and from then on Bankrupt had grave financial difficulties and was greatly in need of funds for working capital and was insolvent. United apparently made many and extensive ad-

vances to it. Bankrupt never at any time gave notes or other evidence of indebtedness to United for such advances. Daniels testified that early in December 1952 Bankrupt owed United money, and that United felt it should have security before advancing any additional monies. He (Daniels) therefore took the Certificate representing all of the capital stock of Green's Bayou out of the safe of Bankrupt in its offices at 1310 McKinney Avenue and carried it into the United office in the next room at 1310 McKinney Avenue where he placed it in the file of United. There is no evidence that a pledge of this stock was made by Bankrupt to United other than this action of Daniels. No note was given, nor was there any written pledge nor corporate minutes, nor entries on the books of either corporation to reflect this claimed transfer. What was done was the sole act of Daniels and not the act of either Bankrupt or United, and this was not a valid pledge of such stock by Bankrupt to United.

(h) If this was a valid pledge of such stock by Bankrupt to United then Bankrupt's financial condition was made worse and that of United was made better and such Three Directors individually and personally profited thereby as stockholders, officers and directors of United. In any event Bankrupt was and continued to be insolvent.

(i) As of date January 26, 1953, there appears upon the minutes of the Directors of *Bankrupt* the following (underscoring mine):

> "Pursuant to call and waiver of notice signed by all of the Directors of the C. J. Dick Towing Company, the annual meeting of the Board of Directors of the Company was held on January 26, 1953, at

3:30 P.M. at 1310 McKinney Avenue, Houston, Texas.

John D. Jones, President, called the meeting to order and Holt P. Daniels, Jr., Secretary and Treasurer, acted as Secretary of the meeting.

The following Directors of the Company were present and participated in the meeting:

John D. Jones,
Holt P. Daniels, Jr.,
Harland I. Casteel,
Alice W. Dorflinger,

Upon motion duly made, seconded, and unanimously carried, it was RESOLVED that the same officers be re-elected. These officers are:

John D Daniels - President
H. I. Casteel - Vice-President
Holt P. Daniels, Jr. - Secretary
Alice W. Dorflinger - Ass'n Secretary
Holt P. Daniels, Jr. - Treasurer
Alice W. Dorflinger - Ass'n Treasurer

The minutes of the previous meeting of the Board of Directors were read and, on motion duly made and seconded, were approved.

John D Jones, President of the Company, made a report with respect to the Company's activities during the past year and Holt P. Daniels, Jr., Secretary, made a report with respect to the Company's financial condition.

John D. Jones, President of the Company, stated to the meeting that the Company was indebted to the United Towing Company at January 31, 1953, after all January transactions had been recorded in the approximate amount of $105,000.00. The President further stated that United Towing Company in consideration of its substantial recent cash advances

to C. J. Dick Towing Company had demanded that appropriate guarantee of payment be made. The President fully considered the matter with United Towing Company and after lengthy discussion during which it was recognized that some portion of the indebtedness would be paid by C. J. Dick Towing Company prior to June 30th, 1953, in the approximate amount of $20,000.00 during the ordinary course of business between the two companies, United Towing Company offered to cancel and extinguish the sums due it on June 30th, 1953, in the amount of approximately $105,000.00 less whatever sums C. J. Dick Towing Company is able to repay in the interim period in exchange for the transfer to United Towing Company on October 1, 1953, of the common stock in Greens Bayou Marine Service Company held by C. J. Dick Towing Company, C. J. Dick Towing Company's note receivable from Greens Bayou Marine Service Company in the amount of $15,000.00 and the account receivable from Greens Bayou Marine Service Company owing to C. J. Dick Towing Company on October 1, 1953, in whatever amount was owing on that date.

Upon lengthy discussion of these facts presented to the Board by the President with regard to indebtedness to United Towing Company the Board was of the opinion that the settlement proposed would result in conveyance of an equity in common stock worth about $95,000.00 together with notes and accounts receivable in excess of $35,000.00 for discharge of a debt amounting to about $85,000.00, however, inasmuch as United Towing Company has advanced during the last sixty days, upon guarantee of sufficient security, sums of money in excess of $88,000.00 to secure the continued operation of C. J. Dick Towing Company, and without which funds C. J. Dick Towing Company could not continue to exist, there being no other source of capital available the Board

RESOLVED that the President and Secretary and Treasurer be and hereby are authorized to accept the offer of United Towing Company and to discharge the indebtedness of United Towing Company in the manner outlined in these minutes by execution of appropriate instruments of transfer and assignment to United Towing Company.

There being no further business, on motion duly made, seconded and unanimously carried, the meeting adjourned.'

(j) At this time, January 26, 1953, there were no funds or source of funds available to Bankrupt, and if it had been forced to repay the United loan at that time, it would probably have had to sell its boats and barges and other equipment, which would likely have put it out of business. On January 26, 1953, the Second National Bank was a creditor of Bankrupt in the sum of $70,815.00. On January 31, 1953, Bankrupt's liabilities exceeded its assets by approximately the sum of $79,069.93 according to a balance sheet prepared from the books of the company by the accountants. Anyway Bankrupt was, on January 26, 1953, insolvent.

(k) Although Defendants claim that the aforesaid transaction of January 26, 1953, became a binding contract upon acceptance by United on February 8, 1953, no convincing evidence of such acceptance was introduced by them. There was no meeting of the Board of Directors of United, nor were there any written instruments then prepared or executed by either United or Bankrupt other than the above quoted minutes of January 26, 1953, introduced by Plaintiff. On February 8, 1953, the Second National Bank was a creditor of Bankrupt in the sum of

$47,817.00. Bankrupt was insolvent both on January 26, 1953, and on February 8, 1953, and owed many unsecured creditors, and so continued up to and including and after October 1, 1953.

If such quoted minutes of the Directors of Bankrupt had at any time any legal effect, the financial condition of Bankrupt was made worse and that of United was made better and such "Three Directors" profited personally and individually thereby.

(1) On October 1, 1953, the transfer complained of was made. Bankrupt transferred to United the capital stock of its wholly owned subsidiary, Green Bayou, along with certain other assets, and United cancelled Bankrupt's debt of $88,277.80 owing to the United on that date. In making this transfer the Three Directors placed a wholly inadequate book value on the capital stock of Greens Bayou of $41,938.60, represented by the original investment of $10,000.00 and a capital gain of $31,938.60. They placed a book value of $15,000.00 upon the promissory note of Greens Bayou owing to Bankrupt, and a book value of $22,314.14 upon the account receivable owing by Greens Bayou to Bankrupt. The remainder of the assets transferred in satisfaction of the debt was shown by an item of accrued interest on that note of $2,995.06. The entire transaction was reflected on Bankrupt's books as follows:

Debit-	Account Payable, United Towing Co.	$82,277.80
Credit-	Notes Receivable, Green's Bayou Marine Service Co.	15,000.00

Accounts Receivable- Affiliated Company,	23,344.14
Accrued Interest Receivable	2,995.06
Investment- Green's Bayou Marine Service Co.,	10,000.00
Gain or Loss on Sale of Capital Assets,	31,938.60
	$82,277.80

(m) I have considered all the evidence as to the value at the time of such transfer of the property of Greens Bayou, including the testimony of the appraisers. I have considered also the value of the stock so transferred and find that the consideration for such transfer was not fair but most unfair. I find that the reasonable market value of such stock on the date it was so transferred to have been not less and probably more than $95,000.00 which is the value set out in the quoted minutes of January 26, 1953. I find that such stock and other property was transferred to United in satisfaction of Bankrupt's debt of $82,277.80 to United. This was not a fair but an unfair transaction.

(n) Bankrupt was insolvent before and at the date of such transfer October 1, 1953, and thereafter and such transfer, if valid, made Bankrupt's financial condition worse and United's financial condition better and was to the individual or personal advantage and profit of Three Directors.

(o) There is no evidence that such transfer was executed under duress. I find it was not.

(p) Such transfer was not made within four months of the filing of the petition in bankruptcy herein.

(q) The transfer of such stock was made with the intent on the part of United, its officers and directors to hinder, delay and defraud the creditors of Bankrupt, *as those terms are used in Section* 67(d)(2)(d) *of the Bankruptcy Act in Article* 3996 *of the Texas Statutes.*

The record shows many transactions which I think show this intent.

There was offered, however, evidence of a number of transactions between Bankrupt and the Second National Bank of Houston which, if admissable in evidence, would have an important bearing on the question of such intent, but upon the objections of Defendants I have excluded them.

(r) Such transfer was made October 1, 1953, which was within one year prior to the filing herein of the petition in bankruptcy, and Bankrupt was insolvent and owed large sums of money to many unsecured creditors at the time of such transfer, or if not, it was by such transfer rendered insolvent. Bankrupt's property remaining in its hands after such transfer was unreasonably small capital with which to engage in or continue its business.

(s) The schedules of Bankrupt filed in the Bankruptcy proceedings listed assets of $232,290.18 and total liabilities of $467,656.38. H. A. Phillips testified that he has on hand the sum of $74,998.47, and total claims filed amount to $601,232.20, of which $33,482.46 consisted of

secured and priority claims. In his opinion, unsecured creditors of the estate, totaling $570,000.00 will have approximately $31,000.00 available for dividends, after allowance for expenses of administration.

CONCLUSIONS OF LAW:

1. There is no evidence that such transfer of such stock was executed under duress.

2. It is claimed that such transfer was a preference within the meaning of Section 60 of the Bankruptcy Act (Section 96, Title 11, U.S.C.A.). This claim is without merit. Such transfer was not made within four months of the filing of the petition in bankruptcy herein.

3. It is claimed that under the facts in this case this court should not uphold but should strike down such transfer because such Three Directors were directors of and purported to act for both Bankrupt and United in such matters.

The rule is well settled in Corsicana National Bank v. Johnson, 251 U.S. 90, where it is said:

> "Was there good cause for the recission? The fact that the same persons were directors and managers of both corporations subjects their dealings inter seae to close scrutiny. That two corporations have a majority or even the whole membership of their boards of directors in common does not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or rati-

fied by the stockholders; and certainly where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where in addition to this the personal interests of the directors or any of them would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud, Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 589; Wardell v. Railroad Company, 103 U.S. 651, 657, et seq.; Thomas v. Brownville & R.R. Co., 109 U.S. 522, 524; Richardson v. Green, 133 U.S. 30, 43; McGourkey v. Toledo & Ohio Ry. Co., 146 U.S. 536, 552. 565."

The evidence here makes it clear, I think, that the transfer of this stock was not to the advantage of Bankrupt and its creditors, but was to the advantage of United, and such Three Directors personally and individually. While the Three Directors were stockholders in both companies, their stock in Bankrupt at the time of such transfer had little if any value, and their personal interests as stockholders and officers and directors in United were enhanced and benefited by such transfer to United.

4. It is claimed that such transfer constitutes a conveyance fraudulent in law within the meaning of Section 67 of the Bankruptcy Act, Subdivision (d) (2) (d) (Section 107 (d) (2) (d), Title 11, U.S.C.A.) as follows:

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title or against him is fraudulent, (d) as to then existing and future creditors, if made or incurred with actual

intent as distinguished from intent presumed in law, to hinder, delay or defraud either existing or future creditors."

It is also claimed that such transfer constitutes a conveyance fraudulent in law under Article 3996 of Vernon's Civil Statutes of Texas, as follows:

"Every gift, conveyance, assignment, or transfer of, or charge upon, any estate real or personal, every suit commenced, or decree judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

My conclusion is that such transfer is fraudulent under Section 67(d)(2)(d) of the Bankruptcy Act and void under such Article 3996, because United and its officers and directors had the actual intent to hinder, delay and defraud the creditors of Bankrupt *within the meaning of such above-quoted statute.*

Such intent is to be determined from the statements, actions, etc., of United, its officers and directors. In Plaintiff's pleadings and at the trial United, et al., were charged with having made such transfer with such intent. One of the Three Directors was placed on the witness stand as an adverse witness by the Plaintiff and denied that he had such intent. Another of such directors was in the

court room during the entire trial, but did not take the stand to explain the various transactions shown by this record, nor to deny the charge of such intent. The other director, a nonresident of Texas, and not a party to the suit did not appear and testify but who doubtless knew of it, nor was his deposition taken in the case.

The conduct of the Three Directors in handling the affairs of both Bankrupt and United; the confusing books of the Bankrupt; the confusing and conflicting reports to the mercantile agencies, the banks and others; the income tax statements; the claimed pledge of the stock of Greens Bayou in December 1952 by removing the certificate of stock from the safe of Bankrupt to the files of United; all taken together, convince me that United and its officers and directors had such intent at the time of such transfer.

The evidence of the transaction with the Second National Bank and others were circumstances pointing to such intent, but Defendants objected to such evidence and their objections were and are sustained and such evidence excluded.

5. It is claimed that such transfer constitutes a conveyance fraudulent in law within the meaning of Section 67, Subdivision (d) (2) (a) of the Bankruptcy Act (Section 107 (d) (2) (a), Title 11, U.S.C.A.) as follows:

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligations, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent."

It is also claimed that such transfer constitutes a conveyance fraudulent in law within the meaning of Section 67, Subdivision (d) (2) (b) of the Bankruptcy Act (Section 107 (d) (2) (b), Title 11, U.S.C.A.) as follows:

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent."

My conclusion is that such transfer is fraudulent under the provisions of these two quoted subsections of the Bankruptcy Act.

The evidence shows that such transfer was made October 1, 1953, which was within one year prior to the filing herein of the petition in bankruptcy and that Bankrupt was insolvent before, at the time of, and after such transfer, or if not, was by such transfer rendered insolvent. Also that Bankrupt at the time of such transfer was engaged in business and the property remaining in its hands was unreasonably small capital with which to carry on such business. Also that at the date of such transfer Bankrupt had large indebtedness to many unsecured creditors, and since the date of such transfer and during the continuation of such business Bankrupt has incurred other large unsecured indebtedness to creditors.

Under these two quoted statutes the transfer is not fraudulent, however, unless incurred without fair consideration. Presumably this refers primarily to the value of the stock and the consideration for its transfer. I have made findings of fact upon this issue and found that the value of the stock transferred was much in excess of the indebtedness of Bankrupt to United, and I conclude that the consideration for such transfer was not fair but inadequate and unfair.

6. I have carefully considered that facts and circumstances with respect to the claim of Defendants that such stock was pledged by Bankrupt to United in December 1952. The evidence shows that it was claimed that Bankrupt was indebted to United in large sums of money and that the Secretary-Treasurer of Bankrupt and of United took the certificate representing the stock of Greens Bayou from the safe of Bankrupt in one room at 1310 McKinney, Houston, and carried it into United's office, next door, and placed it in the file of United. This is all the evidence shows was done. There was no note or written instruments showing the indebtedness of Bankrupt to United, or showing a pledge of such stock. There was no certification by either the Directors of Bankrupt or of United. My conclusion is that such facts and circumstances do not constitute a pledge by Bankrupt to United of such stock, especially when all the surrounding facts and circumstances are considered.

From what has been said it follows that judgment should be and is rendered in favor of Plaintiff against Defendants for such shares of stock and directing that same shall be transferred to and delivered to Plaintiff, and for costs of court.

The other part of this suit is passed for future setting.

Let appropriate decree be drawn and presented.

T. M. KENNERLY
United States District Judge

496 FINAL JUDGMENT

(filed, April 2, 1956)

(Caption Omitted)

BE IT REMEMBERED, that on the 16th day of November, A. D. 1955, there came on to be heard the above entitled and numbered cause, wherein H. A. Phillips, Trustee of the Estate of C. J. Dick Towing Company, Bankrupt, is plaintiff, and United Towing Company, Greens Bayou Marine Service Company, John D. Jones and Holt P. Daniels are defendants, when came the parties in person and by their respective attorneys of record and announced ready for trial, and no jury having been demanded, all matters of fact as well as of law were submitted to the Court for its hearing and determination, whereupon the trial of said cause proceeded from day to day until the 21st day of November, 1955, when the evidence was concluded; and it appearing to the Court, after hearing the pleadings, the evidence, and the argument of counsel, that plaintiff is entitled to recover from all defendants the title to and possession of all of the shares of the capital stock of Greens Bayou Marine Service Company, as prayed for in his Second Amended Complaint; it is accordingly,

ORDERED, ADJUDGED and DECREED that the transfer by C. J. Dick Towing Company to United Towing Company of all of the shares of capital stock of Greens Bayou Marine Service Company on October 1, 1953, be, and the same hereby is, declared null and void, and said transfer is cancelled and set aside; and it is further

ORDERED, ADJUDGED and DECREED that plaintiff, H. A. Phillips, Trustee of the Estate of C. J. Dick Towing Company, Bankrupt, do have and recover judgment against defendants, United Towing Company, Greens Bayou Marine Service Company, John D. Jones and Holt P. Daniels, individually, jointly and severally, for all of the said shares of capital stock of Greens Bayou Marine Service Company; and it is further

ORDERED, ADJUDGED and DECREED that defendants, United Towing Company, Greens Bayou Marine Service Company, John D. Jones and Holt P. Daniels, and each of them, be, and they herby are, directed to transfer and deliver all of the said shares of capital stock of Greens Bayou Marine Service Company to plaintiff.

The cause of action asserted by plaintiff for rents and profits allegedly collected and realized by defendants from certain real property having been heretofore severed by order of this Court entered herein on the 29th day of February, 1956, it is, accordingly,

ORDERED that said cause of action be, and the same hereby is, passed for future setting.

All costs herein incurred to date of entry of this order are taxed against defendants.

DONE and ENTERED at Houston, in said district, on the 2 day of April, 1956.

T. M. KENNERLY
District Judge

APPROVED AS TO FORM:

THAD GRUNDY
Thad Grundy
Attorney for Plaintiff

Willett Wilson
Attorney for Defendants

519 NOTICE OF APPEAL

(filed, June 1, 1956)

(Caption Omitted)

To The Honorable, The Judges of the Said Court:

Notice is hereby given that United Towing Company, Greens Bayou Marine Service Company, John T. Jones and Holt P. Daniels, defendants above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the judgment of this court entered March 14, 1956, and the order of the court overruling defendants' motion for new trial entered in this action on May 3, 1956.

WILLETT WILSON
Willett Wilson, Attorney for Defendants

1313 Texas Avenue Building
Houston 2, Texas
Telephone: CA 7-5168

A copy of this Notice of Appeal has been served upon Thad Grundy, attorney for plaintiff, by mailing the same to his office in 539 San Jacinto Building, Houston 2, Texas, this 1st day of June, 1956.

WILLETT WILSON
Willett Wilson

520 BOND FOR COSTS ON APPEAL

(filed, June 1, 1956)

(Caption Omitted)

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to H. A. Phillips, Trustee, plaintiff, the sum of two hundred fifty dollars ($250.00).

The condition of this bond is that, whereas the defendants have appealed to the Court of Appeals for the Fifth Circuit by notice of appeal filed June 1, 1956, from the judgment of this court entered March 14, 1956, and order overruling motion for new trial entered May 3, 1956, if the defendants shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Sureties:

By

The Aetna Casualty and
Surety Company
By:
A. E. WAGENHAUSER
A. E. Wagenhauser
Resident Vice President
Attest:
W. B. ABBOTT
W. B. Abbott
Resident Assistant Secretary
Surety

(Seal)

Defendants:
United Towing Company
By JOHN D. JONES
John D. Jones, President
1310 McKinney, Houston,
Texas

Attest:
HOLT P. DANIELS JR.
Secretary

Greens Bayou Marine Service
Company
JOHN D. JONES
John D. Jones, President
1310 McKinney Ave.,
Houston, Texas
Attest:
HOLT P. DANIELS JR.
Secretary

JOHN D. JONES
John D. Jones
1310 McKinney Ave.,
Houston, Texas

HOLT P. DANIELS JR.
Holt P. Daniels
1310 McKinney Ave.,
Houston, Texas

Signed and acknowledged before me this 1st day of June, 1956.

CLAUDE T. ALLEN
Notary Public, Harris County, Texas
Claude T. Allen

521 STATEMENT OF THE POINTS ON WHICH DEFENDANTS INTEND TO RELY ON THE APPEAL

(filed, June 25, 1956)

(Caption Omitted)

To The Honorable Judge of Said Court:

POINTS OF ERROR

FIRST POINT

There was a valid transfer of the Greens Bayou stock by Bankrupt to United more than one year prior to filing of Involuntary Petition in Bankruptcy.

First: By pledge to United in December of 1952 as security for an immediate cash loan in a total amount exceeding the fair cash market value of the stock.

Second: By contractual agreement on January 26, 1953, whereby Bankrupt agreed to release or surrender its rights to the stock in settlement of its debt, but to postpone the actual exchange of the stock to October 1, 1953, for tax reasons.

SECOND POINT

Such a transfer as stated in First Point was not a conveyance fraudulent in law within the meaning of Sec. 67 Subd. (d) (2) (a), (d) (2) (b) and (d) (2) (d) and Sec. 107 (d) (2) (a), (d) (2) (b) and (d) (2) (d) of Title 11, U.S.C.A. of the Bankruptcy Act, because a fair consideration was exchanged for the stock.

THIRD POINT

Inadmissible evidence was considered by the Court in making its findings of fact and conclusions of law on which the Court's judgment herein was based, necessitating reversal of judgment.

WILLETT WILSON
Willett Wilson
Attorney for Defendants-Appellants

I, Willett Wilson, Counsel of Record for Defendants-Appellants, certify that a copy of the above Statement of Points on which Defendants intend to rely on appeal has been sent by United States mail to Mr. Thad Grundy, Counsel for Record for Appellee.

WILLETT WILSON
Willett Wilson
13th Floor 1114 Texas Avenue Bldg.
Houston 2, Texas

523 MOTION AND ORDER AS TO ORIGINAL EXHIBITS

(filed, June 27, 1956)

(Caption Omitted)

To The Honorable District Court:

Appellants move that the original exhibits, specifically listed in the order attached hereto, introduced in evidence at the trial of this action be sent to the United States Circuit Court of Appeal for the Fifth Circuit in lieu of copies thereof, for inspection by that court.

WILLETT WILSON
Willett Wilson
1114 Texas Ave. Bldg.
Houston Texas
Attorney for Appellant

It appearing to the court that the original exhibits would be of benefit to the Appellate Court in its review of the case, it is ordered that in lieu of copies thereof, the clerk transmit to the Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana all of the following original exhibits:

523 PLAINTIFF'S EXHIBITS

1 Invoice, Greens Bayou

2. Notes Receivable, Greens Bayou

3 Accounts Receivable, Aff. Co.

4	Accrued Interest Receivable
5	Ledger Sheet, Account 206
22	Income Tax Return, 1952
23	Income Tax Return, 1953
24	General Ledger Sheets, 1951 & 1952
26	Journal Voucher, 3/30/53
27	Journal Voucher, 3/3/53
28	Journal Voucher, 4/30/53
29	Journal Voucher, 5/6/56
30	Journal Voucher, 5/13/56
31-58	Journal Vouchers, various dates
59	Statement of Financial Condition
60-a	Dun & Bradstreet report of 8/27/53 (second paragraph)
61-b	Dun & Bradstreet report of 2/11/53 (last paragraph)
62	Dun & Bradstreet report
63	Bank Records
63-a	Letter dated Feb. 6, 1953 to Miss Alice Dionne, Second National Bank.
63-b	C. J. Dick Towing Co., Statement of the income and earned surplus for the year ended Oct. 31, 1952.
64	Bank Records.
64-a	C. J. Dick Towing Co.; Mortgages of record as of Nov. 30, 1953.

64-b C. J. Dick Towing Co.; Schedule of Equipment Equity as of Oct. 31, 1953.

64-c C. J. Dick Towing Co., Balance Sheet as of Oct. 31, 1953.

64-d C. J. Dick Towing Co., Statement of Income and earned surplus for the year ended Oct. 31, 1953.

64-e Vouchers Payable 10/31/53.

64-f & 64-g Accounts Payable 10/31/53.

67 Summary of Debts & Assets.

525 DEFENDANTS. EXHIBITS

1. Deposit slip for $10,515 to account of C. J. Dick Towing Co. dated 12/4/52 representing down payment on tugboat "Danntless" sold by United to Balse Faulcers Corp., and first advance on loan to Dick.

2. Deposit slip for $8,500 to account of C. J. Dick Towing Co., dated 12/6/52, representing second advance on loan to Dick from funds received by United from sale of its tugboat "Danntless".

3. Cancelled checks of United Towing Co. to Dick for the $8,500 above shown as deposited. (Defendants' Exhibit #2)

4. Deposit slip for $40,000 to Account of C. J. Dick Towing Co. dated 12/8/52 representing third advance on loan to Dick out of funds received by United from sale of its tugboat "Danntless".

5. United's check dated 12/8/52 for $40,000 being the check used to purchase cash draft, (Defendant's Exhibit #6), deposited to Dick (Defendant's Exhibit #4)

6. Cashiers draft dated 12/8/52 for $40,000 payable to C. J. Dick Towing Co. purchased by check. (Defendant's Exhibit #5)

7. Deposit slip for $18,000 to account of C. J. Dick Towing Co. dated 12/9/52 representing fourth advance on loan to Dick from funds received by United from sale of its tugboat "Danntless".

8. United's check dated 12/9/52 for $18,000 being the check deposited, (Defendant's Exhibit #7)

9. Deposit slip for $12,000 to account of C. J. Dick Towing Co. dated 12/10/52 representing fifth advance on loan to Dick from funds received by United from sale of its tugboat "Danntless".

10. United's check dated 12/10/52 for $12,000 being the check deposited (Defendant's Exhibit #9)

11. Photo of Green's Bayou Marine Service Co. stock certificate #4 for 1,000 shared issued to C. J. Dick Towing Co. 10/4/48 and cancelled 10/1/53.

12 & 13. Photo of stock book stub and Greens Bayou Stock Certificate #5 for 1,000 shares issued to United Towing Co. dated Oct. 1st, 1953 shown as being transferred from C. J. Dick Towing Co.

14. List of Unrecorded Equities in Major Assets of C. J. Dick Towing Co. as of 12/1/52.

15. List of Unrecorded Equities in Major Assets of C. J. Dick Towing Co. as of 10/41/53.

in connection with the appeal being taken in this case, and that said clerk make the necessary arrangements for the safe-keeping, transportation and return of such exhibits as is ordinarily done in transmitting original exhibits to the Appellate Court.

Entered this the 27 day of June, 1956 at Houston, Texas.

T. M. KENNERLY
Judge

I, Willett Wilson, Counsel of Record for Appellants, certify that a copy of the above motion for order as to original papers or exhibits has been sent by United States Mail to Mr. Thad Grundy, Counsel of Record for Appellee, contemporaneously with its filing.

WILLETT WILSON
Willett Wilson

527 ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

(dated, July 5, 1956)

(Caption Omitted)

It Having been called to the attention of the Court that the remaining time for filing the record on appeal and docketing the appeal in the above style cause is insufficient to permit the clerk to prepare the record, it is ordered

that the time for filing the record on appeal and docketing the appeal be extended 90 days from the date (June 1, 1956) of filing the first notice of appeal.

T. M. KENNERLY
Judge

Approved:

WILLETT WILSON
Willett Wilson
Attorney for Defendants
(Appellants)

THAD GRUNDY
Thad Grundy
Attorney for Plaintiff
(Appellee)

527A MOTION REQUESTING NINETY DAYS EXTENSION OF TIME WITH WHICH TO HAVE TRANSCRIPT OF RECORD PRINTED

(Caption Omitted)

To the Honorable, The Judges of the Said Court:

Now come the Appellants (defendants) in the above entitled cause and move the Court that an order be entered granting a ninety day extension of time for printing of the transcript of record in the above styled case, the Alpha Printing Company of Houston who have been

requested by the Appellants to print said record being unable to complete the printing in a shorter period.

WILLETT WILSON
Willett Wilson, Attorney for Appellants
1313 Texas Avenue Building
Houston 2, Texas
Telephone: CA-7-5186

ORDER

Came on to be heard this day the motion of Appellants requesting a ninety day extension of time for the printing the transcript of record in the above styled case, and the Court having considered such motion does hereby grant said request and extend said time for completing of the printing of the transcript of record sixty days from this date, such request being made within the proposed time under the rules.

ENTERED this the 8th day of October, 1956.

J. C. HUTCHESON JR.
Chief Judge for the Court

A copy of this Motion and Order has been served upon Thad Grundy, attorney for plaintiff, by mailing the same to his office in 1504 Esperson Building, Houston, Texas, this the 5th day of October, 1956.

WILLETT WILSON
Willett Wilson

528 CLERK'S CERTIFICATE

UNITED STATES OF AMERICA :
SOUTHERN DISTRICT OF TEXAS :

I, V. BAILEY THOMAS, Clerk of the United States District Court for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and all proceedings had in the case, as called for in the Designation for Contents of Record on Appeal, Page 1 of this TRANSCRIPT, in Cause No. 8648 on the Civil Docket of said Court at Houston entitled H. A. PHILLIPS, TRUSTEE, Plaintiff, vs. UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES and HOLT P. DANIELS, Defendants, as the same now appears on file and of record in my office.

TO CERTIFY WHICH, Witness my hand and the Seal of said Court at Houston, in said District, this the 24th day of August, A.D., 1956.

(Seal)

V. BAILEY THOMAS, CLERK,
United States District Court,
Southern District of Texas

By W. PAUL HARRISS
W. Paul Harriss, Deputy

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 14 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 371

UNITED TOWING COMPANY, ET AL., *Appellants*

v.

H. A. PHILLIPS, TRUSTEE, *Appellee*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

CLAUDE T. ALLEN
WILLETT WILSON
Counsel for Petitioner

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	5
SPECIFICATIONS OF ERROR TO BE URGED	8
REASONS FOR GRANTING THE WRIT	10
ARGUMENT	10
CONCLUSION	14
CERTIFICATE OF SERVICE	14
APPENDIX	15

LIST OF AUTHORITIES

CASES

Blackman v. Bechtel, 80 F. 2d 505	11, 13
Congleton v. Roberts, 61 F. 902	11
Corsicana National Bank v. Johnson, 251 U.S. 90	12
Faulkner v. Magri, 90 F. 2d 808	13
Nicholson v. Scott, 50 F. Supp. 209	14
St. Louis S.W. Ry. Co. v. Mitchell-Crittenden Tie Co., 148 S.W. 1190, err. ref.	12
United Towing Co., et al. v. H. A. Phillips, Trustee, 242 F. 2d 627	2

UNITED STATES STATUTES

11 U.S.C.A. 96	4, 5
11 U.S.C.A. 107	3, 4, 5
28 U.S.C.A. 1254(1)	2

TEXAS STATUTES

Art. 1358-1	2, 3, 7, 8, 10
Art. 3996	3, 4, 6, 14

CONSTITUTION OF THE UNITED STATES

XIV Amendment	3, 10

Supreme Court of the United States

October Term, 1957

No._____

UNITED TOWING COMPANY, ET AL., *Appellants*

v.

H. A. PHILLIPS, TRUSTEE, *Appellee*

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Fifth Circuit

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, United Towing Company, Greens Bayou Marine Service Company, John D. Jones, and Holt P. Daniels, pray that a writ of certiorari issue to review the Judgment and decree of the Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Texas, Houston Division.

Opinions Below

The opinion of the United States District Court for the Southern District of Texas (R. 290) is reported in *United*

Towing Company, et al. v. H. A. Phillips, Trustee, ____ F. Supp. ____. The opinion of the Court of Appeals (R. 368) is reported in *United Towing Company, et al. v. H. A. Phillips, Trustee,* 242 F. 2d 627.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered April 5, 1957 (R. 368). Petition for rehearing was seasonably filed by petitioners and was denied on May 17, 1957, (R. 393). The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

Questions Presented

1. Whether the Trial Court can arbitrarily refuse to accept the evidence of a pledge or transfer of a stock certificate, when all the necessary elements of the pledge or transfer under the Texas Law, V.T.C.S. Art. 1358-1, (a) are shown.

2. Whether the Trial Court and Court of Appeals' holdings were influenced by erroneous views of the law.

3. Whether, in an action by a Trustee to set aside a transfer (made more than four months prior to bankruptcy petition pursuant to a contract entered into more than a year prior) to a certificate of stock, in satisfaction of a debt, the Trial Court can substitute its own opinion of a *higher* value not supported by any offered evidence and refuse to accept the plaintiff's (Trustee in Bankruptcy) qualified real estate appraiser's lower value, so as to create a basis for its Finding that the transfer was for an unfair or inadequate consideration, and therefore made with intent to defraud other credi-

tors, under the provisions of Section 67, Subdivision (d) (2) (a) & (b) of the Bankruptcy Act, Title 11 U.S.C.A. as well as V.T.C.S. Article 3996.

4. Whether a Finding of value as stated in paragraph 3 amounts to fundamental error and is in violation of XIV Amendment, Sec. 1 of the United States Constitution.

5. Why appellants are not entitled to hold the Greens Bayou stock until their debt is paid if the stock should be worth slightly more than the debt it was transferred to satisfy since the stock has no fixed or listed market value and appraisals of its true value would necessarily vary.

Statutes Involved

V.T.C.S. Article 1358-1 (a) provides:

"Uniform Stock Transfer Act; How Title transferred. Title to a certificate and to the shares represented thereby can be transfered only: (a) By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; * * *.

V.T.C.S. Article 3996 provides:

"Every gift, conveyance, assignment, or transfer of, or charge upon, any estate real or personal, every suit commenced, or decree judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representa-

tives or assigns, be void. This article shall not affect the title of a purchaser, *for valuable consideraiton*, unless it appears that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Section 67, Subdivision (d) (2) (a) of the Bankruptcy Act (Section 107 (d) (2) (a), Title 11, U.S.C.A.) provides:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligations, if made or incurred *without fair consideration* by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent."

Section 67, Subdivision (d) (2) (b) of the Bankruptcy Act (Section 107 (d) (2) (b), Title 11, U.S.C.A.) provides:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred *without fair consideration* by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent."

U.S.C.A. Title 11, Sec. 96, p. 609:

" * * * Where the preference is voidable, the trustee may recover the property or, if it has been converted,

its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. * * * "

Statement

This was a suit by appellee, the Trustee in Bankruptcy (for brevity called Trustee) of C. J. Dick Towing Company (for brevity called Bankrupt or Dick) against United Towing Co. (for brevity called United), Greens Bayou Marine Service Company (for brevity called Greens Bayou), John D. Jones (for brevity called Jones), and Holt P. Daniels, Jr. (for brevity called Daniels), appellants, seeking to set aside a transfer of the capital stock of Greens Bayou in satisfaction of a debt owed by Dick (Bankrupt) to United, on the following claimed grounds:

1. That the debt was antecedent under the Bankruptcy Act.
2. That the transfer was illegal and against public policy in that the same persons were officers and directors of both companies.
3. That the transfer constituted a conveyance fraudulent in law within the meaning of Sec. 67, Subdivisions (d) (2) (a), (b) and (d) of Title 11, U.S.C.A., in that the consideration was not fair, the stock being worth substantially more than the debt settled.

Appellants' answer denied:

1. That the debt was antecedent under the Bankruptcy Act having been incurred and contracted to be paid more than one year prior to any Bankruptcy proceedings, and paid more than four months prior to Bankruptcy proceedings according to the terms of the contract agreement.

2. That the transfer was illegal or against public policy simply because the same directors managed both Dick and United because the corporations were separate legal entities, and capable in law of contracting with each other.

3. That the transfer was made by Dick without any intent to hinder, delay or defraud creditors, under the laws of Texas or Bankruptcy Acts but instead that the transfer was made for the specific purpose of enabling Dick to keep the cash money that it had on hand, necessary to continue the operation of the business rather than to pay the debt with cash and thereby be left with insufficient operating funds and a stock not readily salable.

4. That the transfer was fraudulent under the above quoted sections of the Bankruptcy Act, as well as Art. 3996, V.C.S.T. because the stock was actually transferred on October 1, 1953, more than four months prior to filing petition in Bankruptcy (pursuant to a previous contract agreement) in satisfaction of a valid debt worth more than the value of the stock transferred and therefore for a fair consideration.

Appellants alleged and proved:

1. A valid pledge of the stock by Dick to United in December of 1952, under the Texas law (V.T.C.S., Art. 1358-1 (a) for cash loans in excess of $88,000.00 (R. 165 to 168), and
2. The settlement of Dick's debt by its transfer of the stock to United on October 1, 1953 (R. 41), pursuant to the contractual agreement of January 26, 1953 set out in its directors' minutes.

It is undisputed:

1. That the Greens Bayou stock certificate represents all the stock of the company and that the only asset of the company is 16 to 18 acres of land.
2. That the land represented by the stock exchanged was encumbered to the extent of $25,000.00. (Admitted by Appellee (Plaintiff - Trustee) in his pleadings.) (R. 20, par. XVII and - 46)
3. That the amount of the debt, settled by the transfer of the stock, was $82,277.80 (R. 300).
4. That Appellee's (Plaintiff - Trustee) expert real estate appraisal witness, Mr. W. T. Peckinpaugh, Jr., placed a gross value of $87,951.00 (R. 49) on the 16 to 18 acres of land, (which would make the land worth $62,951.00 net, on his appraisal after deducting the $25,000.00 encumbrance). (Actually proven indebtedness against land was $30,000.00.)
5. That Appellants' (Defendants') expert real estate appraisal witness, Mr. Leslie Appelt, placed a gross value

of $89,492.50 (R. 50) on the 16 to 18 acres of land, (which would make the land worth $64,492.50 net, on his appraisal after deducting the $25,000.00 encumbrance).

6. That this was all the testimony of value of the 16 to 18 acres that was offered in evidence and which net value would be over $17,000.00 *less* than the amount of the debt ($82,277.80) that the transfer discharged and over $12,000.00 less than the amount of the debt discharged if we use the Court's $95,000.00 value taken from the statement in Dick's Board of Directors minutes of January 26, 1953, that they were of the opinion that the stock was worth $95,000.00 which was not offered as evidence of the value of stock and would have little weight beside the appraisal of qualified real estate men.

Specifications of Error to be Urged

The United States Court of Appeals for the Fifth Circuit erred:

1. In sustaining the Trial Court's finding that a valid pledge of the Greens Bayou stock under the Laws of Texas V.T.C.S., Art. 1358-1, (a), was not shown when it was agreed (R. 59, 60, 61) by the three officers and directors of Dick to pledge the stock, in return for a much needed cash loan by United, and Daniels was authorized to take the properly endorsed certificate (R. 318, Def. Ex. 11) from Dick's files and deliver it to United's bookkeeper who placed it in United's files, and which action was followed by the turning over to Dick of checks

from United as they were received from the sale of its tug Dauntless (R. 165 to 171, R. 111, Def. Ex. 1 to 10).

2. In sustaining the Trial Court's Finding that a valid contract was not entered into between Dick and United as recited in Dick's Directors' minutes of January 26, 1953, when the directors accepted United's offer to take the Greens Bayou stock in satisfaction of Dick's debt, due United, more than one year prior to Bankruptcy Petition, and United ratified the agreement on February 6, 1953 (R. 67), and it was performed on October 1, 1953 as provided by the agreement, more than four months prior to Bankruptcy.

3. In holding, that the same persons being directors and managers of both Dick and United corporations, Dick's action in paying back United its loan, made to Dick when Dick was badly in need of operating capital, was a fraud on the other creditors of Dick when the agreement to repay was contracted more than a year prior to petition in bankruptcy, and payment made more than four months prior to petition according to terms of the agreement, for a fair consideration.

4. In holding that the Trial Court could substitute its own opinion of higher value not based on any *offered evidence* (but on statement of (unqualified) Dick's directors in their minutes In re Re-BO Mfg. Co., Inc., 90 F. 2d 388, Syl. 3), and refuse to accept the plaintiff's (Trustee) qualified real estate appraiser's lower value so as to create a basis for its Finding that the transfer of the Greens Bayou stock

in satisfaction of a debt, was for an unfair or inadequate consideration, and therefore made with intent to defraud other creditors.

5. In holding that Appellants could not retain the Greens Bayou stock until their debt was satisfied if the stock should be appraised at a slightly greater value than the debt it satisfied, since the stock had no fixed or listed market value.

6. Because such Finding of the court, as stated in paragraph 4, is an arbitrary Finding not being supported by substantial or offered evidence, is fundamental error, and is clearly wrong and unjust and in violation of the Sec. 1 Amendment XIV of Constitution of the United States since the Court is depriving Appellants (Defendants) of their property without due process of law, and just compensation.

Reasons for Granting the Writ

1. The decision of the Court below is in disregard of and violates the plain language of the Statute V.T.C.S. Art. 1358-1, (a).

Argument

To constitute a valid pledge or transfer of stock under the laws of Texas all that is necessary is that the stock be endorsed by the person or corporation appearing on the certificate to be the owner, and delivered to its transferee. This is exactly what Mr. Daniels did after it was agreed to by the officers of both corporations. (R. 59, 60). The stock certificate was properly endorsed, (R. 172) and by its delivery the pledge or transfer was consummated and for the courts to hold that some additional action is

necessary to complete the transfer of the certificate violates the plain language of the Texas Statute.

Mr. Daniels testified to the pledging of the stock:

> Q. At that time Dick was desperately in need of cash funds?
> A. Dick needed funds.
> Q. That day when you and Mr. Jones and Mr. Casteel discussed the giving of this pledge, was Mr. Casteel down here, or did you call him?
> A. We called him on the phone in Pittsburgh and advised him of Dick's operating conditions in the needing of operating funds.
> Q. When you transferred that certificate, when you got the certificate of Green's Bayou out of the safe of C. J. Dick, where did you take it?
> A. I gave it to Mr. Jones. He gave me the check and I took it back to the Dick Company bookkeeper.
> Q. Who was that?
> A. Mr. R. G. Treadway, and Mr. Jones took the stock and walked back to United Towing Company's office and laid it on the desk of the United Towing Company bookkeeper, Mr. Hughes, who later on that same day or the following day come and asked me what should he do with the certificate of stock; at which time I told him to place it in the United Towing Company Minutes Book.

We must keep in mind that the loan to Dick in December of 1952 and the pledge of the stock by Dick was to avert a financial crash by Dick and to continue in business. *Blackmay v. Bechtel*, 80 F. 2d 505, Syl. 2. It was not necessary that the books of the company show the transfer of the stock. *Congleton v. Roberts*, 61 Fed. 902. It was to be a short term loan as it was anticipated that since Dick was in the process of selling about $200,000.00

worth of its obsolete equipment, the loan would be repaid in a few days or weeks (R. 146) and so no note was given and none deemed to be required and the loan was carried on Dick's books as a debt and sum of money due United. (R. 209).

2. The Trial Court and Court of Appeals holdings were influenced by erroneous views of the law:

(a) When they held that the offer of United to accept the Greens Bayou stock from Dick in satisfaction of Dick's debt, and the acceptance of the offer by Dick as recited in Dick's directors' minutes of January 26, 1953 and ratification by United on February 6, 1953 (R. 67), did not create a valid contract.

Argument

Such holding is in violation of the rule of contract law as set out in *St. Louis SW Ry. Co. v. Mitchell-Crittenden Tie Co.*, 148 S.W. 1191 (Error Refused) holding: "Effect is to be given to the contract from the time the parties agreed to its terms." As they did when Dick at its directors meeting of January 26, 1953 accepted United's offer. Although not necessary since they had made the offer to Dick, which Dick accepted on January 26, 1953, United, at its Directors' meeting on February 8, 1953, accepted or ratified the January 26, 1953 contract (R. 67).

(b) When they held that, under *Corsicana National Bank v. Johnson*, 251 U.S. 90, the transfer of stock to United by Dick in settlement of Dick's debt to be valid must have been to the advantage of Bankrupt (Dick) and its creditors (R. 302, 303).

Argument

This is not the Bankruptcy law and never has been. It is never to the advantage of the rest of the creditors of a bankrupt for one of their number to be paid more than four months before bankruptcy but it is not in violation of the Bankruptcy Act or law so long as consideration is fair, *Faulkner v. Magri*, 90 F. 2d 808 Syl. 3. On the facts the instant case is completely distinguishable from the *Corsicana National Bank* case in that in the latter case the Bank having made an excessive loan, transferred the notes to a Loan Company, managed by the same officers and directors as the bank, for their full face value, after the insolvency of the maker had been brought to light, thereby attempting to escape a loss on its excessive loan. In the instant case the officers and directors of Dick, who were also the stockholders when they transferred the stock to United in satisfaction of Dick's debt to United, were simply paying off a perfectly valid debt that was owed United for money advanced to Dick to avert a financial crash, *Blackman v. Bechtel*, 80 F. 2d 505. So long as the debt was paid prior to four months of bankruptcy Dick had the legal right to prefer any creditor it chose, *Faulkner v. Magri*, 90 F. 2d 808 Syl. 3, and the law applicable to the facts in the Corsicana National Bank transfer would not be applicable to the situation in the Dick transfer of stock, the latter being a repayment of a valid debt or loan. The fact that some of the stockholders of United were the same as Dick's and might thereby indirectly benefit by the repayment of the debt or loan by Dick did not in any way make the repayment fraudulent, so long as the debt was valid to start with and the Court has found a valid debt of $82,277.80 (R. 299).

The Court's finding of a $95,000 value of the Greens Bayou property is based upon a mistaken concept of the offered evidence of value as no $95,000 appraisal value was offered, and the Court's failure to consider and deduct the $25,000 admitted encumbrance in finding the net value of the property transferred causes the Court to reach an erroneous concept of value. Upon considering and deducting the admitted encumbrance against the property the fair net value becomes much less than the debt is was exchanged in satisfaction of. *Nicholson v. Scott*, 50 F. Supp. 209 Syl. 5. The consideration being fair, Sec. 67 Sub. (d) (2) (a), (b) & (d) and *Vernon's Texas Civil Statutes*, Art. 3996 are not applicable.

In the Trial Court's own language (R. 307) under these statutes the transfer is not fraudulent, however unless incurred without fair consideration.

Conclusion

For these reasons, it is respectfully submitted that the petition for Writ of Certiorari should be granted.

CLAUDE T. ALLEN

WILLETT WILSON
Counsel for Petitioner

Certificate of Service

A copy of the foregoing brief has been served upon Thad Grundy, Esq., attorney for appellee, by mailing the same to his office, 1720 Niels Esperson Building, Houston, Texas, this 13th day of August, 1957.

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16292

UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES AND HOLT P. DANIELS, *Appellants*,

VERSUS

H. A. PHILLIPS, TRUSTEE, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

(April 5, 1957)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: John D. Jones, Holt P. Daniels, and Harland I. Casteel, owned all of the stock of C. J. Dick Towing Company, herein sometimes called Dick or the bankrupt. These three individuals owned substantially all of the stock of United Towing Company, herein referred to as United. Dick owned all of the stock of Greens Bayou Marine Service Company, herein called Greens Bayou. The three individuals were the officers and directors of each of the three corporations. On Feb-

ruary 26, 1954, an involuntary petition in bankruptcy was filed against Dick and it was thereafter adjudged bankrupt. H. A. Phillips was appointed trustee of Dick, the Bankrupt, and brought suit against United, Greens Bayou, Jones and Holt to set aside as fraudulent a transfer of the Greens Bayou stock by Dick to United. Casteel lived in Pennsylvania and was not made a party. The district court held the transfer fraudulent and the defendants have appealed.

In the latter part of 1952 Dick was in financial difficulties. United had loaned Dick substantial sums. No notes or other evidences of indebtedness were given for these loans. More money was needed by Dick. United had negotiated for the sale of a tugboat from which it was about to receive some money. Daniels testified that,

> "* * * we agreed by discussion, called Mr. Casteel, that United was to receive considerable sums of cash money from the sale of this boat and that we were willing to advance to C. J. Dick Towing Company almost the entire proceeds in excess of $100,000 to C. J. Dick Towing Company, but because of the fact that at that time there was already an existing debt owing by Dick to United, for the sake of other stockholders so we would not breach our fiduciary relationship to them, and so we would have some collateral or security that any loaning institution might require—the only thing that would be of any value to United to hold until those funds might be repaid was the stock in Greens Bayou Marine Service Company; and in December of 1952 and concurrent with the first tender of this 10,000-dollar check I have previously mentioned, we did in essence and in fact take the Greens Bayou stock out of Dick Company's file and place it in United Company's files. It had already been indorsed and was transferable after

the indorsement of the stock; and that stayed in United's files until we actually concluded as evidenced by the books on October 1, 1953, the actual surrender of that stock by United and issuance of new certificates by Greens Bayou to United for the stock in the company."

In the records of the Bankrupt are minutes of a meeting of its directors dated January 26, 1953, from which we quote the following:

"John D. Jones, President of the Company, stated to the meeting that the Company was indebted to the United Towing Company at January 31, 1953, after all January transactions had been recorded in the approximate amount of $107,000.00. The President further stated that United Towing Company in consideration of its substantial recent cash advances to C. J. Dick Towing Company had demanded that appropriate guarantee of payment be made. The President fully considered the matter with United Towing Company and after lengthy discussion during which it was recognized that some portion of the indebtedness would be paid by C. J. Dick Towing Company prior to June 30th, 1953, in the approximate amount of $20,000.00 during the ordinary course of business between the two companies, United Towing Company offered to cancel and extinguish the sums due it on June 30th, 1953, in the amount of approximately $105,000.00 less whatever sums C. J. Dick Towing Company is able to repay in the interim period in exchange for the transfer to United Towing Company on October 1, 1953, of the common stock in Greens Bayou Marine Service Company held by C. J. Dick Towing Company, C. J. Dick Towing Company's note receivable from Greens Bayou Marine Service Company in the amount of $15,000.00 and the account receivable from Greens Bayou Marine

Service Company owing to C. J. Dick Towing Company on October 1, 1953, in whatever amount was owing on that date.

"Upon lengthy discussion of these facts presented to the Board by the President with regard to indebtedness to United Towing Company the Board was of the opinion that the settlement proposed would result in conveyance of an equity in common stock worth about $95,000.00 together with notes and accounts receivable in excess of $35,000.00 for discharge of a debt amounting to about $85,000.00, however, inasmuch as United Towing Company has advanced during the last sixty days, upon guarantee of sufficient security, sums of money in excess of $88,000.00 to secure the continued operation of C. J. Dick Towing Company, and without which funds C. J. Dick Towing Company could not continue to exist, there being no other source of capital available the Board.

"RESOLVED that the President and Secretary and Treasurer be and hereby are authorized to accept the offer of United Towing Company and to discharge the indebtedness of United Towing Company in the manner outlined in these minutes by execution of appropriate instruments of transfer and assignment to United Towing Company."

Daniels testified that on the 5th or 6th of February, 1953, the offer of the Bankrupt, shown by its minutes, to exchange the stock for a cancellation of the debt, was accepted by United.

On October 1, 1953, the stock of Greens Bayou was transferred to United. This date was within a year prior to bankruptcy. On this date the indebtedness of the Bankrupt to United was $82,277.80. The district court found that the stock had a value at the time of the transfer of not less than $95,000. It found that the Bankrupt was in-

solvent in December, 1952, the time of the purported pledge, on January 26, 1953, the date of a meeting of the Bankrupt's directors as shown by the minutes, in February, 1953, the time of the alleged acceptance or ratification, and on October 1, 1953, the date of the transfer. The court found that the stock of Greens Bayou was not validly pledged by the Bankrupt to United in December, 1952, as the only evidence purporting to show a pledge was the taking of the stock certificate, which had been previously indorsed in blank, from one office room to another next door; that the corporate action of the Bankrupt at its directors' meeting of January 26, 1953, was not shown by convincing evidence to have become a binding contract; and that the stock was transferred by the Bankrupt to United on October 1, 1953, for a consideration that was inadequate and unfair, and with an intent to hinder, delay and defraud the creditors of the Bankrupt. The district court found that the stock in the Bankrupt corporation of the three individuals, who acted for it and for United, had little if any value, and that by the transfer of the Greens Bayou stock the individuals profited by the benefit to United, and the financial condition of the Bankrupt was made worse. It was held that the transfer of the Greens Bayou stock was void under Sec. 67(d)(2)(a) of the Bankruptcy Act, 11 U.S.C.A. §107(d)(2)(a), Sec. 67(d)(2)(b) of the Bankruptcy Act, 11 U.S.C.A. §107(d)(2)(b), and Vernon's Ann. Civ. Stat. Art. 3996. Judgment was rendered directing United to transfer and deliver the stock to the plaintiff trustee in bankruptcy.

Appealing from the adverse judgment, United and its directors urge that there was a valid transfer by pledge in December, 1952, and by way of sale in January, 1953,

or February, 1953, that the consideration was fair, and that the court considered evidence which had been excluded.

First for our consideration and, we think, the most important question to be resolved, is whether there was error in the determination of the district court that there was no valid pledge of the Greens Bayou stock by the Bankrupt to United in December, 1952. Corporate directors and officers are agents of the corporations electing or appointing them. The general rule, where two corporations have the same person acting for them, has thus been stated:

> "In accordance with the principle that a director or officer of a corporation cannot, without the knowledge and consent of the corporation or its stockholders, represent an adverse party to a transaction with the corporation, it is also true that where a transaction or contract is entered into between corporations having officers or directors in common, this circumstance will be considered and the transaction will be jealously regarded by the law." 13 Am. Jur. 953, Corporations §1000.

A somewhat similar case had its origin in the Northern District of Texas and was twice before this court. *Corsicana National Bank v. Johnson*, 218 F. 822, 237 F. 1018. On the first appeal a remand followed a decision on a procedural question. On the second appeal no opinion was written by this court. The Supreme Court of the United States reviewed the decision and in its opinion said:

> "Was there good cause for the recission? The fact that the same persons were directors and managers of both corporations subjects their dealings *inter sese* to close scrutiny. That two corporations have a majority or even the whole membership of

> their boards of directors in common does not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders; and certainly where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where in addition to this the personal interests of the directors or any of them would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud." *Corsicana National Bank v. Johnson*, 251 U.S. 68, 90, 40 S. Ct. 82, 64 L. Ed. 141.

The opinion from which the foregoing quotation was taken was followed two years later by another leading case in which the court used the following language:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy." *Geddes v. Anaconda Mining Co.*, 254 U.S. 590, 599, 41 S. Ct. 209, 65 L. Ed. 425.

The Geddes case is cited and the above quoted language is quoted with approval by the Court of Civil Appeals of

Texas. *Felty v. National Oil Co. of Texas*, 155 S.W. 2d 656. The doctrine is applicable where the directors of one corporation cause its property to be encumbered for the benefit of another corporation of which they are also directors. *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443, 4 S.E. 431, 8 Am. St. Rep. 88. Has United and its stockholding directors met the burden cast upon them?

The only evidence upon which they rely to sustain a pledge is the testimony of Daniels. It was his testimony that "We were willing to advance" funds to the Bankrupt, "and so we would have some collateral or security", that "the only thing that would be of any value to hold until those funds might be repaid was the stock in Greens Bayou Marine Service Company" and "we did in essence and in fact take the Greens Bayou stock out of Dick Company's file and place it in United Company's file". The "we" who were willing to advance funds were the directors of United, the "we" who would have some security were the directors of United, and they were the same persons who as "we", "did in essence and in fact" take the stock from the Bankrupt's file and transfer it to United's file although, in response to a leading question, Daniels testified that it was as an officer of United that he gave directions to its bookkeeper as to the place where the stock certificate should be kept. There was no writing to evidence either the debt or the pledge and there were no minutes of either pledgor or pledgee. The January 26, 1953, minutes recited a discussion of the proposed transfer of stock in cancellation of the debt but did not make reference to any prior pledge of the stock unless it can be said that there was such a reference in the recital commenting on United's advances to the Bankrupt "during the last sixty days upon guarantee of security".

The Texas statute, which the transfer challenged, is:

> "Every gift, conveyance, assignment or transfer of, or charge upon, any estate real or personal, every suit commenced, or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." Vernon's Ann. Civ. Stat. Art. 3996.

The provisions of Sec. 67(d)(2) which was the basis of the attack upon the transfer, are:

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; * * * or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors". 11 U.S.C.A. § 107(d)(2).

Amply supported by the evidence are the findings that there was no valid pledge of the Greens Bayou stock in December, 1952, and no valid transfer or agreement to transfer the stock prior to October, 1953. The evidence supports the district court's holding that the transfers were fraudulent under the Texas act and under the quoted provisions of the Bankruptcy Act. There seems to be no

doubt as to the authority of a trustee in bankruptcy to attack a transfer fraudulent under the Texas statute. *Reeves v. Powell,* Tex. Civ. App., 267 S.W. 328.

The appellants assign error based upon the following statement in the district court's findings of fact:

> "The record shows many transactions which I think show this [fraudulent] intent.
>
> "There was offered, however, evidence of a number of transactions between Bankrupt and the Second National Bank of Houston which, if admissible in evidence, would have an important bearing on the question of such intent, but upon the objections of Defendants I have excluded them."

We do not regard this as showing, as appellants contend, that the court considered inadmissible evidence. On the contrary, it shows that the evidence, although material, has been excluded and had not been considered.

The appellants, in urging that the trial court was in error in finding the transfer of the stock unfair to the Bankrupt and for an inadequate consideration, attempt to demonstrate that the value of the Greens Bayou stock was considerably less than the amount of the debt of the Bankrupt to United rather than considerably more as found by the court. On confusing and conflicting evidence, which we have no occasion to here review, the court made findings amply supported. These findings we should not, even if so disposed, disturb.

We think the judgment entered was a proper one. It carries out sound policy as to the fiduciary obligations imposed upon corporate directors. The judgment is

AFFIRMED.

JUDGMENT.

Extract from the Minutes of April 5, 1957

UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES and HOLT P. DANIELS,

No. 16292. versus

H. A. PHILLIPS, TRUSTEE.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, United Towing Company, Greens Bayou Marine Service Company, John D. Jones and Holt P. Daniels, and the surety on the appeal bond herein, The Aetna Casualty and Surety Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * *

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 14 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 371

UNITED TOWING COMPANY, ET AL., *Petitioners*

v.

H. A. PHILLIPS, TRUSTEE, *Respondent*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

THAD GRUNDY
Counsel for Respondent
1720 Esperson Building
Houston 2, Texas

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

SUBJECT INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	5
1. The decisions of the District Court and the Court of Appeals are correct	5
2. There are no grounds under Rule 19 of this Court for granting the writ of certiorari	8
(a) The decision is not in conflict with the decision of another Court of Appeals	8
(b) There is no decision of an important state question in conflict with applicable state law	8
(c) The decision presents no important question of federal law	11
(d) There is no decision of a federal question in conflict with applicable decisions of this Court	12
3. The case is moot	12
4. The petition should be denied with damages for delay	12
CONCLUSION	13

LIST OF AUTHORITIES

CASES

Buffum, Trustee v. Peter Barceloux Co., 289 U.S. 227, 77 L. Ed. 1140, 53 S. Ct. 539	12
Comstock v. Group of Institutional Investors, 335 U.S. 211, 92 L. Ed. 1911, 68 S. Ct. 1454	7
Corsicana National Bank v. Johnson, 251 U.S. 68, 64 L. Ed. 141, 40 S. Ct. 82	6, 10, 12
Dixon v. Sanderson, 72 Tex. 359, 10 S.W. 535	9
Dunaghan v. Bushey, 152 Tex. 630, 263 S.W. 2d 148	10

CASES	PAGE
Edward Hines Yellow Pine Trustees v. Martin, 268 U.S. 458, 69 L. Ed. 1050, 45 S. Ct. 543	10
Geddes v. Anaconda Mining Co., 254 U.S. 590, L. Ed. 425, 41 S. Ct. 209	6, 12
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 93 L. Ed. 672, 69 S. Ct. 535	7
Griffin v. McCullough Tool Co., 265 S.W. 2d 131 (wr. ref., N.R.E.)	9
Just v. Chambers, 312 U.S. 383, 85 L. Ed. 903, 61 S. Ct. 687	7, 8
Magnum Import Co. v. DeSpoturno Coty, 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531	8
Mercury Life & Health Co. v. Hughes, 271 S.W. 2d 842, 845-846 (wr. ref.)	10
Paddock v. Jackson, 41 S.W. 700, 702 (wr. ref.)	9
Pepper v. Litton, 308 U.S. 295, 84 L. Ed. 28, 60 S. Ct. 238	12
Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 68 L. Ed. 413, 44 S. Ct. 164	11
Spiegel's Estate v. Commissioner, 335 U.S. 701, 93 L. Ed. 330, 69 S. Ct. 301	10
UNITED STATES STATUTES	
11 U.S.C.A. 107d (2)(a)	2, 3
11 U.S.C.A. 107d (2)(b)	2, 3
11 U.S.C.A. 107d (2)(d)	2, 3
VERNON'S ANNOTATED CIVIL STATUTES	
Article 1358-1(a)	2, 8
Article 3996	2, 3, 9
RULES OF SUPREME COURT OF THE UNITED STATES	
Rule 40	5
TEXTS	
10 Tex. Jur. 961, 962, 977-981	9
33 Tex. Jur. 682-683	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 371

UNITED TOWING COMPANY, ET AL., *Petitioners*

v.

H. A. PHILLIPS, TRUSTEE, *Respondent*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

To The Honorable The Chief Justice And The Associate Justices of the Supreme Court of the United States:

H. A. PHILLIPS, Trustee of the Estate of C. J. Dick Towing Company, Respondent herein, respectfully presents this brief in opposition to the petition for writ of certiorari.

Opinions Below

The citations are correct. The opinion of the District Court has not yet been published.

Jurisdiction

Petitioners properly invoke the jurisdiction of this Court.

Question Presented

Whether a transfer of all of the capital stock of one Texas corporation by a second Texas corporation to a third Texas corporation, while the transferor was insolvent and while the same three persons constituted all of the officers and directors, and substantially all of the stockholders, of both the transferor and the transferee, was a fraudulent conveyance within the meaning of Section 67d of the *Bankruptcy Act* and Article 3996, *V.A.C.S. of Texas*.

Statutes Involved

The statutes involved are Sections 67d (2) (a) [11 U.S.C.A. 107d (2) (a)], 67d (2) (b) [11 U.S.C.A. 107d (2) (b)], and 67d (2) (d) [11 U.S.C.A. 107d (2) (d)] of the Bankruptcy Act, and Articles 1358-1 (a) and 3996, *Vernon's Annotated Civil Statutes of Texas* (Petition, 3-4).

Statement

The statement of the case made by petitioners is incomplete, inaccurate, and misleading.

John D. Jones, Holt P. Daniels, and Harland I. Casteel owned all of the stock of C. J. Dick Towing Company, herein sometimes called Dick or the Bankrupt. These three individuals also owned substantially all of the stock of

United Towing Company, herein called United. Dick owned all of the stock of Greens Bayou Marine Service Company, herein called Greens Bayou. The three individuals were the officers and directors of each of these three Texas corporations. On February 26, 1954, an involuntary petition in bankruptcy was filed against Dick and it was thereafter adjudged bankrupt. H. A. Phillips was elected trustee of the Bankrupt, and brought suit in the District Court against United, Greens Bayou, Jones and Daniels to set aside as fraudulent the transfer of the Greens Bayou stock by Dick to United on October 1, 1953. Casteel lived in Pennsylvania and was not made a party.

Respondent alleged:

(1) That said transfer was a fraudulent conveyance within the meaning of Section 67d (2) (a) of the Bankruptcy Act, in that it was made without fair consideration when Bankrupt was or was thereby rendered insolvent.

(2) That said transfer was a fraudulent conveyance within the meaning of Section 67d (2) (b) of the Bankruptcy Act, in that it was made without fair consideration when Bankrupt was engaged in business for which the property remaining in its hands was an unreasonably small capital.

(3) That said transfer was a fraudulent conveyance within the meaning of Section 67d (2) (d) of the Bankruptcy Act, in that it was made with actual intent to hinder, delay and defraud creditors.

(4) That said transfer was fraudulent within the meaning of Article 3996, V.A.C.S. of Texas, in that it was made with an intent to delay, hinder, or defraud creditors.

(5) That said transfer was against the public policy of the State of Texas and was therefore void and unenforceable, in that the said Jones, Daniels, and Casteel represented dual and adverse interests in acting as officers, directors, and stockholders of Bankrupt and United.

Respondent also alleged other grounds for the invalidity of such transfer, but such grounds were disposed of adversely to respondent by the District Court and were not carried forward on appeal. Petitioners denied that the transfer was invalid, and pleaded further that Bankrupt had pledged the Greens Bayou stock to United more than one year prior to bankruptcy.

The case was tried before the District Court without a jury. Daniels was called by the Trustee as an adverse witness and testified at length. Jones, although present in the courtroom during the entire trial, did not take the stand either to explain or deny any of the transactions shown by the record. Casteel, although he knew of the suit, did not appear and testify, nor was his deposition taken (R. 304-305).

The District Court made careful and detailed findings of fact and conclusions of law (R. 292-302). The Court of Appeals set out a somewhat more condensed statement of the evidence in its opinion (Appendix to Petition 16-19). Finally, the Court of Appeals, after holding that the findings and conclusions of the District Court were "amply supported by the evidence," concluded:

> "We think the judgment entered was a proper one. It carries out sound policy as to the fiduciary obligations imposed upon corporate directors. The judgment is affirmed."

With the concise and accurate statements of the case by both of the lower courts having already been presented to this Honorable Court in the record and in the petition, respondent believes that it would be redundant and probably in violation of Rule 40 of this Court for him to undertake again to restate the evidence.

Argument

While in complete control of both Bankrupt and United, and while Bankrupt was hopelessly insolvent, Jones, Daniels and Casteel, "sitting on both sides of the fence" (R. 63-64), transferred the Greens Bayou stock from Bankrupt to United — from their "right-hand pocket" to their "left-hand pocket" (R. 154, 208-210). The evidence of their fraud was spelled out in detail in the corporate minutes which Daniels prepared (R. 295-298; Appendix to Petition, 17-18); in the false information given by Daniels to Dun & Bradstreet (R. 186-189, 196-199); and in the financial statement of Dick furnished by petitioners in 1953, which was false by $331,714.95 (R. 262-265). Petitioners had every opportunity to convince the District Court and the Court of Appeals of the fairness of their transactions.

There is no conflict of decisions; there is no important question of federal law; there is in this petition nothing but an attempt to gain still another review of the evidence.

1. *The decisions of the District Court and the Court of Appeals are correct.*

Respondent contended in the trial court that the transfer was made on October 1, 1953, that it was fraudulent under the Bankruptcy Act and under the Texas statute, and that it was void under Texas law because of the representation

by petitioners of dual and adverse interests as officers, directors and stockholders of Dick and United. Petitioners denied these allegations and contended that a valid pledge of the stock had been made in December, 1952, or that an agreement to transfer the stock had been made in January or February, 1953. The District Court found that the transfer was fraudulent and void, and that *no valid pledge of the stock had been made*, relying strongly upon the decision of this Honorable Court in *Corsicana National Bank v. Johnson*, 251 U.S. 68, 64 L. Ed. 141, 40 S. Ct. 82. The Court of Appeals, addressing its attention particularly to the defensive theory of a pledge alleged by respondent but not proven to the satisfaction of the trial court, reviewed the evidence offered by petitioners in support of their theory, and concluded:

> "Amply supported by the evidence are the findings that there was no valid pledge of the Greens Bayou stock in December, 1952, and no valid transfer or agreement to transfer the stock prior to October, 1953." (Appendix to Petition, 23).

The Court of Appeals likewise followed the Corsicana Bank case, and also the leading case of *Geddes v. Anaconda Mining Co.*, 254 U.S. 590, L. Ed. 425, 41 S. Ct. 209.

Petitioners are here insisting that the trial judge's findings against their contentions, reviewed and concurred in so emphatically by the Court of Appeals, were wrong, and that this Honorable Court should grant certiorari to review again these findings. This argument had been rejected so many times by this Honorable Court that even a cursory examination by petitioners of the decisions should have been sufficient to convince them that this Court will not re-

view concurrent findings of fact by the two courts below, in the absence of exceptional showing of error. In *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 92 L. Ed. 1911, 68 S. Ct. 1454, it was said that "a seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error;" and in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 93 L. Ed. 672, 69 S. Ct. 535, the Court, referring to Rule 52(a) of the Federal Rules of Civil Procedure that findings of fact shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses, restated the rule (336 U.S. at 275):

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only clearly erroneous findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence — indeed found the evidence to warrant support of the patent even in matters not found by the trial court. A court of law, such as this Court is; rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

To the same effect is the language of this Court in *Just v. Chambers*, 312 U.S. 383, 85 L. Ed. 903, 61 S. Ct. 687 (at page 385 of 312 U.S.):

> "In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of the claimants' injuries and

> the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the courts below upon these matters (Texas & New Orleans R. Co. v. Brotherhood of Railway & S.S. Clerks, 281 U.S. 548, 558, 50 S. Ct. 427, 429, 74 L. Ed. 1034) and we confine our attention to the question of the survival of the causes of action."

The principle that this Court will not grant certiorari merely to act as a fact finding body was aptly stated by Mr. Chief Justice Taft in *Magnum Import Co. v. DeSpoturno Coty*, 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531, in saying that certiorari "jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

2. *There are no grounds under Rule 19 of this Court for granting the writ of certiorari.*

(a) *The decision is not in conflict with the decision of another Court of Appeals.*

Neither the petition nor the record even remotely suggest such a conflict. The Court of Appeals in fact applied settled law with respect to fraudulent conveyances, as expressed by numerous decisions of that court and the courts of other circuits.

(b) *There is no decision of an important state question in conflict with applicable state law.*

Although petitioners say that the decision is in disregard of Article 1358-1, V.A.C.S. of Texas (Petition, 10), what the lower courts actually did was to apply correctly the pertinent Texas statutes and Texas case law. Article 1358-1

provides in part for transfer of title to a stock certificate only by delivery of the certificate, endorsed by the owner. The Texas courts hold that in order to constitute a valid pledge of a stock certificate by a corporation as security for a loan, there must be (1) a valid debt owing by the corporation; (2) authority to endorse and deliver the stock certificate as security for the loan, duly vested in an officer or agent by the directors; and (3) delivery of the certificate, properly endorsed. 10 *Texas Jurisprudence*, 961, 962, 977-981, and cases cited; 33 *Texas Jurisprudence*, 682-683, and cases cited. The only fact found by the District Court in support of petitioners' theory of pledge was that Daniels took the Greens Bayou certificate from the safe of Bankrupt and carried it across the hall to the safe of United (R. 307), and the Court rightly concluded that this act, *standing alone*, did not constitute a pledge of the stock. To have held otherwise would have presented the conflict with state law which petitioners seek to inject.

The other Texas statute involved is Article 3996, V.A.C.S. The rule in Texas is that whether a conveyance is in fraud of creditors is a question of fact in each case, *Griffin v. McCullough Tool Co.*, 265 S.W. 2d 131 (writ of error refused, N.R.E.); and that a voluntary conveyance for an inadequate consideration is prima facie fraudulent as to existing creditors, even in the absence of a dishonest motive, *Dixon v. Sanderson*, 72 Tex. 359, 10 S.W. 535; *Paddock v. Jackson*, 41 S.W. 700, 702 (writ of error refused). Voluntary conveyance of property by one indebted is evidence of a fraudulent intent, and the burden of proving that such intent did not exist is upon the donor, *Dixon v. Sanderson*, supra. Petitioners made no effort to meet this burden of proof, and are further circumscribed by the specific

evidence of their *actual* intent to defraud above set forth in the first paragraph of this argument (supra, p. 4).

The trial court also concluded that the transfer of the Greens Bayou stock was voidable because of the representation of dual and adverse interests by Jones, Daniels and Casteel, following the rule of the *Corsicana National Bank* case, and the Court of Appeals agreed. That this decision certainly is not in conflict with applicable state law may be seen by an examination of the Texas rule, which is considerably more stringent. A transaction of this nature is held to be against public policy and unenforceable against the corporation, as where the directors have a direct personal financial interest in the matter, there is no one to represent the corporation. Such contracts are absolutely *void*, and may not be adopted or ratified. *Mercury Life & Health Company v. Hughes*, 271 S.W. 2d 842, 845-846 (writ of error refused); *Dunaghan v. Bushey*, 152 Tex. 630, 263 S.W. 2d 148.

In the instant case, certain routine questions involving the application of Texas statutes and rules of Texas decisions were passed upon by a judge who has been identified with the practice of law in his native state for more than half a century, first as a practicing attorney and then as Judge of the Southern District of Texas for over 25 years. His rulings were scrutinized and approved by an appellate court whose membership included another judge from that state, who likewise had been first an attorney and then an occupant of that same district bench. Such interpretations of local law have long been considered binding by this Honorable Court. *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458, 69 L. Ed. 1050, 45 S. Ct. 543; *Spiegel's Estate v. Commissioner*, 335 U.S. 701, 93 L. Ed. 330, 69 S. Ct. 301.

(c) *The decision presents no important question of federal law.*

The decision of the courts below follows a familiar and well-defined road in applying established principles of law to a very ordinary situation. Petitioners, trapped by their own greed in their attempt to filch from the dwindling treasury of a foundering bankrupt the only remaining asset of any substantial value, are unable even to state the existence of a federal question. Their scattergun charge that a finding of the court below is in violation of the Fourteenth Amendment to the Constitution of the United States (which charge is unsupported by evidence, argument or authorities) is met head on by the decision of this Honorable Court in *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 68 L. Ed. 413, 44 S. Ct. 164:

> "This writ must be dismissed. The petition therefor stated that the cause involved a grave question of vital importance to the public, and alleged as special reason for its re-examination that the decree would deprive petitioner of property without due process of law, and of freedom to contract, contrary to the Federal Constitution. The opinion below is reported in 33 A.L.R. 626, 282 Fed. 837.
>
> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use, — primarily a question of fact. That is not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto."

The petition in the instant case is cut from the same cloth, and deserves the same fate.

(d) *There is no decision of a federal question in conflict with applicable decisions of this Court.*

Respondent has already pointed out that the courts below followed the principles enunciated by this Court in *Corsicana National Bank v. Johnson* and *Geddes v. Anaconda Mining Company*, supra. To the same effect are the leading cases of *Buffum, Trustee v. Peter Barceloux Co.*, 289 U.S. 227, 77 L. Ed. 1140, 53 S. Ct. 539, and *Pepper v. Litton*, 308 U.S. 295, 84 L. Ed. 28, 60 S. Ct. 238, which lend additional support to the decision in the case at bar. There is not the faintest suggestion to the contrary in the petition.

3. *The case is moot.*

If this Honorable Court were able to extract from the hodgepodge of conflicting and confusing questions, specifications of error, and reasons for granting the writ strewn throughout the petition, a single ground for consideration of the case on its merits, respondent respectfully suggests that even in that event the case has become moot. The decision of the courts below may be grounded solely on the application of the rule of Texas law which renders void the transaction by petitioners with themselves as officers, directors and stockholders of Bankrupt and United. Petitioners have not in any manner presented that question to this Court.

4. *The petition should be denied, with damages for delay.*

The grounds urged by petitioners herein for granting the writ are entirely without substance The question supposedly presented by petitioners have all been foreclosed by

decisions of this Court. This is a plain case in which the Court should apply Rule 56(4) and award damages for delay. Petitioners have been in possession of the assets of Greens Bayou for four and one-half years, and nearly five months have already elapsed since the judgment of the Court of Appeals (rendered April 5, 1957) became final when the petition for rehearing was overruled on May 17, 1957 (R. 368, 393). Respondent respectfully suggests that if this Court sees fit to deny the petition, damages amounting to ten percent of the appraised value of the real property owned by Greens Bayou ($87,951.00; R. 49) would be appropriate.

Conclusion

The petition for a writ of certiorari is utterly without merit and should be denied, with damages to respondent for delay.

Respectfully submitted,

THAD GRUNDY
Attorney for H. A. Phillips, Trustee
1720 Niels Esperson Building
Houston 2, Texas

LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U.S.
FILED
OCT 23 1957
CLERK

IN THE

Supreme Court of the United States

October Term, 1957

No. 371

UNITED TOWING COMPANY, ET AL., *Petitioners*
v.
H. A. PHILLIPS, TRUSTEE, *Respondent*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY TO BRIEF FOR RESPONDENT

CLAUDE T. ALLEN
WILLETT WILSON
Counsel for Petitioners
1114 Texas Avenue Building
Houston 2, Texas

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

SUBJECT INDEX

	PAGE
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
RESPONDENT'S REASONS 1, 2, 3 AND 4	3-4
RESPONDENT'S REASON 1 RESTATED	4
PETITIONERS' ARGUMENT AGAINST RESPONDENT'S REASON 1	4
RESPONDENT'S REASON 2 RESTATED	5
PETITIONERS' ARGUMENT AGAINST RESPONDENT'S REASON 2	5
RESPONDENT'S REASON 3 RESTATED	7
PETITIONERS' ARGUMENT AGAINST RESPONDENT'S REASON 3	7
RESPONDENT'S REASON 4 RESTATED	8
PETITIONERS' ARGUMENT AGAINST RESPONDENT'S REASON 4	8
CONCLUSION	10

LIST OF AUTHORITIES

CASES

Blackman v. Hechtel, 80 F. 2d 505, 508	9
Corsicana National Bank v. Johnson, 251 U.S. 68, 64 L. Ed. 141, 40 S. Ct. 82	3, 4, 5
Dunagan v. Bushey, 152 Texas 630, 263 S.W. 2d 148	5
Finefrock v. Kenova Mine Car Co., 37 F. 2d 310, 313	6
Geddes v. Anaconda Mining Company, 254 U.S. 590, L. Ed. 425, 41 S. Ct. 209	3, 4
Mercury Life and Health Company v. Hughes, 271 S.W. 2d 842	5
Nicholson v. Scott, 50 F. Supp. 209, 211, Syl. 8	2, 6, 7
St. Louis Southwestern Ry. Co. v. Mitchell-Chrittenden Tie Co., 148 S.W. 1191 (error refused)	9
Victoria Gravel Co. v. Neyland, 114 S.W. 2d 415, E.R.	4

TEXAS STATUTES

Article 1358-1, V.A.C.S. of Texas	3, 7
Article 3996, V.A.C.S. of Texas	2, 3, 5, 6

TEXTS

Collier on Bankruptcy, Vol. 4, Sec. 67d	2, 3, 5

IN THE

Supreme Court of the United States

October Term, 1957

No. 371

UNITED TOWING COMPANY, ET AL., *Petitioners*

v.

H. A. PHILLIPS, TRUSTEE, *Respondent*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY TO BRIEF FOR RESPONDENT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, United Towing Company, Greens Bayou Marine Service Company, John D. Jones and Holt P. Daniels, herein, respectfully present this brief in reply to brief for Respondent on Petition for Writ of Certiorari.

Correct Statement of One of the Questions Presented

Respondent has attempted a statement of one of the questions presented but a more correct statement would be "Whether a transfer of all of the capital stock of one Texas corporation (Greens Bayou), by a second Texas corporation (Dick) to a third Texas corporation (United) in satisfaction of a valid debt (created by a cash loan from United to Dick, to keep Dick operating) was a fraudulent conveyance within the meaning of Section 67d of the Bankruptcy Act and Article 3996, V.A.C.S. of Texas, where the transfer was made more than four months prior to the filing of an Involuntary Petition in Bankruptcy against Dick and where the same three persons constituted all of the officers and directors, and substantially all of the stockholders of both the transferor and the transferee corporations", or stated in another way, "Where "U" and "D" corporations have same officers and directors, and substantially same stockholders, and "U" loans "D" cash money for payment to creditors and other operational purposes, can "D" legally pay back its debt to "U" more than four months prior to Bankruptcy in preference to other creditors".

Other questions presented in Petition (pg. 2, 3).

Statutes Involved

Respondent's statement of Statutes Involved is substantially correct.

Statement

A preference payment of a debt more than four months prior to the filing of an Involuntary Petition in Bankruptcy is permitted under the Bankruptcy Act even though Bankrupt be insolvent at the time. *Nicholson v. Scott*, 50 F. Supp. 209, 211, Syl. 8.

Respondent in his reply brief to Petition for Certiorari gives the hereinafter set out reasons why the Court should deny the Writ of Certiorari.

Respondent's Reason 1

That the transfer of the stock was fraudulent and void under the *Corsicana National Bank v. Johnson*, 251 U.S. 68, 64 L. Ed. 141, 40 S. Ct. 82, and *Geddes v. Anaconda Mining Company*, 254 U.S. 590; L. Ed. 425, 41 S. Ct. 209, because the officers and directors and majority stockholders of Dick and United were the same.

Respondent's Reason 2

That the transfer of the stock by Dick to United in satisfaction of the debt due by Dick to United was prima facie fraudulent under Section 67(d) of the *Bankruptcy Act* and Article 3996, *V.A.C.S. of the State of Texas*, in that it was made without fair consideration and with actual intent to hinder, delay and defraud creditors.

Respondent's Reason 3

That a valid pledge of the Greens Bayou stock by Dick to United under Article 1358-1, *V.A.C.S. of Texas* (Petition 10) was not shown because for a corporation to pledge its stock as security for a loan, there must be (1) a valid debt owing by the corporation; (2) authority to endorse and deliver the stock certificate as security for the loan duly vested in an officer or an agent by the directors; and (3) delivery of the certificate properly endorsed.

Respondent's Reason 4

There was no exceptional showing of error and no grounds under Rule 19 of this Court.

Respondent's Reason 1 Restated

That the transfer of the stock was fraudulent and void under the *Corsicana National Bank v. Johnson*, 251 U.S. 68, 64 L. Ed. 141, 40 S. Ct. 82, and *Geddes v. Anaconda Mining Company*, 254 U.S. 590, L. Ed. 425, 41 S. Ct. 209, because the officers and directors and majority stockholders of Dick and United were the same.

Petitioners' Argument Against Respondent's Reason 1

Neither the *Corsicana National Bank* case nor the *Geddes* case support this contention. The *Corsicana National Bank* case says: "Transactions through officers or directors acting at the same time for both companies are presumptively fraudulent, and therefore *voidable by stockholders* within a reasonable time after discovery, *unless expressly authorized or ratified by the stockholders.* The stockholders of Dick being the officers thereof, as well as the officers and the majority stockholders of United, accepted the loan to Dick by United and approved of the transfer of the Greens Bayou stock to United by Dick in settlement of the debt. Since they performed the acts of transferring the stock they certainly authorized and ratified it. *Victoria Gravel Co. v. Neyland*, 114 S.W. 2d 415, E.R. The *Geddes* case simply holds that the consideration must be fair. The fairness of this consideration will be discussed under Respondent's Reason 2.

Neither of the cases of *Mercury Life and Health Company v. Hughes*, 271 S.W. 2d 842, and *Dunaghan v. Bushey*, 152 Texas 630, 263 S.W. 2d 148, cited by Respondent are in point as they were cases of individual contracts between the corporation and its directors which is not our case as both Dick and United were distinct legal organizations or corporations and possessed independent powers and privileges and so not withstanding their identity of stock ownership and affiliation in management, for some purposes, must be regarded as separate corporations, for instance, as being capable of contracting with each other. *Corsicana National Bank v. Johnson*, Syl. 11.

Respondent's Reason 2 Restated

That the transfer of the stock by Dick to United in satisfaction of the debt due by Dick to United was prima facie fraudulent under Section 67(d) of the *Bankruptcy Act* and Article 3996, *V.A.C.S. of the State of Texas*, in that it was made without fair consideration and with actual intent to hinder, delay and defraud creditors.

Petitioners' Argument Against Respondent's Reason 2

The Trial Court in its "Conclusions of Law" says (R. 305, Par. 5):

> "It is claimed that such transfer constitutes a conveyance fraudulent in law within the meaning of Section 67, Sub. (d) (2) (a) of the Bankruptcy Act."

"It is also claimed that such transfer constitutes a conveyance fraudulent in law within the meaning of Section

67, Sub. (d) (2) (b) of the Bankruptcy Act", then goes on to say (R. 307) "Under these two quoted statutes the transfer is not fraudulent, however, unless incurred without fair consideration". Article 3996, *V.A.C.S. of Texas*, contains this same provision; "This article shall not affect the title of a purchaser, *for valuable consideration*, unless it appears that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

The only offered evidence of value of the Greens Bayou stock or land that it represented was by Respondent's own witness, Mr. Peckinpaugh who placed a gross value of $87,951 on the stock and land that it represented (R. 30), and Mr. Leslie Appelt, Petitioners' appraiser, who placed a gross value on the stock and land it represented of $89,492.50 (R. 50). Respondent admitted these were gross values (R. 204) and that the property was encumbered to the extent of at least $25,000 (R. 20, 46, 204) making the stock or land have a net value of around $63,000 which stock was exchanged by Dick to United in satisfaction of a debt of $82,277.80 so found by the Trial Court (R. 300); "I find that such stock and other property was transferred to United in satisfaction of Bankrupt's debt of $82,277.80." The preference payment of Dick's debt to United *for a fair consideration more than four months prior to Bankruptcy* certainly did not show any intent to defraud creditors. "Fraud is not to be presumed and something more is required than the mere weight of preponderance of evidence, and it must be established by clear, unequivocal and convincing evidence." *Nicholson v. Scott*, 50 F. Supp. 209, Syl. 5, 7, 8; *Finefrock v. Kenova Mine Car Co.*, 37 F. 2d 310, 313. Where is any clear, unequivocal and convincing evidence of any fraud in Dick paying back

to United a perfectly valid debt? In the *Scott* case *it was conceded that at the time of the transfer in question, the defendant, Charles W. Scott was insolvent and was unable to meet his debts* but the consideration being fair, the transfer was considered not fraudulent. The *Nicholson v. Scott* case also holds fair consideration is given for property when in exchange for such property as a fair, equivalent therefor, and in good faith, property is conveyed or *an antecedent debt is satisfied.*

Respondent's Reason 3 Restated

That a valid pledge of the Greens Bayou stock by Dick to United under Article 1358-1, *V.A.C.S. of Texas* (Petition 10) was not shown because for a corporation to pledge its stock as security for a loan, there must be (1) a valid debt owing by the corporation; (2) authority to endorse and deliver the stock certificate as security for the loan duly vested in an officer or an agent by the directors; and (3) delivery of the certificate properly endorsed.

Petitioners' Argument Against Respondent's Reason 3

It is submitted that the Trial Court's finding of no pledge of the stock as security for the loan by United in the instant case is a decision in conflict with applicable state law, for the following reasons: (1) a valid debt owing by Dick to United was found by the Trial Court (R. 300, par. (m); (2) Mr. Daniels testified to the endorsement and delivery of the stock certificate as security for the loan. He was an officer and director and the delivery was with the authority of the President, Mr. Jones,

and with his knowledge and approval. Mr. Daniels testified that he and Mr. Jones, the President, discussed the pledge of the stock with Mr. Casteel, the other stockholder and officer, and director (R. 59), *"so after we consulted with Casteel and he agreed that was the thing to do, I went back in the Dick Towing Company file* (both Dick and United officed on same floor but used different bookkeepers and Banks for their business) *and got it out of there, we have the one certificate evidencing all the shares in Green's Bayou held by Dick, and brought it in to Mr. Jones".* (R. 54) *"It had already been indorsed and was transferable after the indorsement of the stock".*

Respondent's Reason 4 Restated

There was no exceptional showing of error and no grounds under Rule 19 of this Court.

Petitioners' Argument Against Respondent's Reason 4

It is submitted that when the trial court went outside of the offered evidence of value of the Green's Bayou property (R. 30, 50, 204, 20, 46) and arbitrarily found a value, that had not been offered as evidence, this *found value* was erroneous, being unsupported by any substantial or competent evidence. In using this incompetent and unsubstantial evidence of value as a basis for finding that an unfair consideration was exchanged, this finding also was erroneous.

The Court has also found that the agreement to transfer the Greens Bayou stock for the debt as stated in the Directors' minutes of January 26, 1953 (R. 295, 296, 297) was not a binding contract although it recited the

acceptance of an offer by United to accept the stock in settlement of the debt and, although not necessary, United ratified it on February 6, 1953, according to Mr. Daniel's testimony (R. 67). Under state law this would have become a binding contract on January 26, 1953, more than a year prior to bankruptcy, regardless of the fact that the actual transfer date of the stock was postponed to October, 1953. The Trial Court's finding that this was not a binding contract is in conflict with *St. Louis Southwestern Railway Co. v. Mitchell-Chrittenden Tie Co.*, 148 S.W. 1191 (error refused), which holds *the effective date of the contract was when the parties agreed to its terms and not when it was to be performed.* The record in this case is overrunning with admissions by Respondent and testimony (R. 52, 59, 60) to the effect that if Dick had not received the money from United at the time it did, it would probably have had to sell its equipment and go out of business or could not have continued to operate. Respondent admitted that Dick needed money in a hurry and got money in a hurry from United, the only source that it could borrow any money at the time. Under *Blackman v. Bechtel*, 80 F. 2d 505, 508, this honest effort on the part of United to help Dick avert a financial crash and to continue in business was a perfectly legal and commendable transaction, as it promoted the interest of all creditors. In the face of all of this, Respondent has the gall to make the contention that when Dick paid United back the loan, it was in defraud of creditors, intentionally overlooking the admitted fact that Dick would have been out of business some fourteen months sooner if United had not loaned Dick the money, and that United was the only source from which Dick could secure any money to continue operating. If that is an

honest contention on the part of the Respondent, then something has been left out of our Golden Rule Book. Respondent's "Dime Novel" words, such as "filch", "scattergun", and "cut from same cloth", are far removed from legal phraseology but their use is no surprise when considering Respondent's contention that it is quite legal for United to lend Dick money to keep it operating and to avert a financial crash but it is illegal and fraudulent for Dick to pay the money back, more than four months prior to bankruptcy.

Respondent should have gone further in his brief and correctly informed the Court that the Greens Bayou stock under the agreement of all parties concerned was left in the custody of Petitioners' attorney, pending the outcome of the suit (R. 175). That after the overruling of Petitioners' Motion for Rehearing in the Fifth Circuit Court of Appeals, both the stock and possession of the property were voluntarily turned over to Respondent. No damages have been caused to Respondent by the filing of the Petition for Certiorari since Respondent has possession of the property and the stock.

Conclusion

For the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

CLAUDE T. ALLEN

WILLETT WILSON
Counsel for Petitioners
1111 Texas Avenue Building
Houston 2, Texas